86-1792

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN F. ("JACK") WALSH, *et al.*,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BEVERLY C. MOORE, JR.
MOORE & BROWN
4900 Massachusetts Avenue, N.W.
Suite 205
Washington, D.C. 20016
(202) 364-1032

[OTHER COUNSEL LISTED ON NEXT PAGE]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

LANDON GERALD DOWDEY
LAW OFFICES OF LANDON GERALD DOWDEY
310 Metropolitan Square
Washington, D.C. 20006
(202) 639-8687

WILLIAM H. MCDONALD
JOHN E. PRICE
WOOLSEY, FISHER, WHITEAKER, *et al.*
300 South Jefferson
Springfield, MO 65806
(417) 869-0581

CHARLES R. WATKINS
SACHNOFF WEAVER & RUBENSTEIN
30 South Wacker Drive
Chicago, IL 60606
(312) 207-6480

Counsel for Petitioners

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held (807 F.2d 1000, 1007-1011 (D.C. Cir. 1986)) that the legislative history of the Magnuson-Moss Consumer Product Warranty Act (15 U.S.C. §2301 et seq.), as set forth in H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 42, reprinted in 1974 U.S. Code Cong. & Adm. News. 7702, 7724, did not modify Fed. R. Civ. P. 23(c)(2) (as previously construed in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974)), so as not to require prohibitively costly individual notice of class action pendency to millions of owners of allegedly defective automobiles. More precisely, was it a "sufficiently clear" expression of Congressional intent to modify a provision of the Federal Rules of Civil Procedure, in the meaning of Califano v. Yamasaki, 442

U.S. 682, 700 (1979), that the House Committee Report, which was issued shortly after Eisen and was explicitly adopted in relevant portion by the House-Senate Conference Report, stated:

> The purpose of [the Act's 100 named plaintiffs and other] jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts. However, if the conditions of this section are met . . . [s]ection 110(d) should be construed reasonably to authorize the maintenance of a class action.... [T]his section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers. In particular, assuming that other requirements for a class action are met, your Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the

> financial burden of such identification and notification would be likely to deny them relief.

807 F.2d at 1008 (emphasis added by Court of Appeals; footnotes omitted).

The petitioners in this case are listed as follows:

John F. Walsh, Employers Casualty Company, John F. & Joyce A. Garbo, Painters Insurance Fund, Kathleen J. & Carlo Campione, Donald L. & Evelyn J. Kerr, Grange Mutual Casualty Company, Mary Jo Smith, Ruth H. Simning, Jacob L. & Agnes R.M. Slemmer, George C. Dunnells, Hanover Insurance Companies, John J. Godbold, Jr., Pennsylvania National Mutual Casualty Company, James T. Kennedy, Jr., Strick's Motel, Inc., Gladys M. Griffin, James B. Gilbert, Kay Planting Company, Irene A. Rooks, Maurice C. Brooks, Eileen H. Thoubboron, Amica Mutual Insurance Company, Foster A. Guffey, Martha D. Meidinger, Patricia E. Newberry, Kenneth J. Dombrowski, Raymond W. Albertson, III, Harold G. Soladay, Harry V. & Cynthia A. Shilvock, Lawrence W. Greene, Maurice C. Brooks, Michael J. Wortman, R. David Pearsall, Randy L. Bunnell, Peter J. Benedetti, Robert C. McIntyre, Barbara J. Macbeth, John I. Turner, Nola B. Whitley & B&W Grain, Inc., The Ole Black Kettle Restaurant, Inc. and Philip N. Derosia, James E. & Lillian A. Cepek, Mrs. Cully B. Oakes, Gerald & Amy Pedersen, Judith A. and Mildred Rosenthal, Hazelle B. Richards, State Farm Insurance Company, Mildred E. Smith, Max C. and JoAnn Traven, Phyllis M. & Kenneth H. Stacy, Blue Cross and Blue Shield of Delaware, Thomas A. & Alice L. Burns, Cecil L. Crowe, Fred E. Baca, Francis D. Johnstone, John G. & Joy L. Seidl, Dennis L. & Linda S. Bugbee, Nora Greene, R.J. & Elizabeth G. Anderson,

Menorah Chapels at Millburn, Inc. & Herbert L. Ross, Jerry & Elizabeth L. Portwood, Harry A. & Virginia M. Seroka, David H. Sebora, Jonathan A. Shatz, Glenn E. & Doris V. Sayles, Vivian B. Gey, Raymond B. Doutt, Nationwide Insurance Company, Debra A. Walsh, Juanita P. Opstein, John B. Howell, Lawrence D. Von Behren, Shelter Insurance Companies, David R. & Jeannie S. Wingerter, Stanley P. Mindock, Joan I. Pearson, Janice C. Harper, Earl F. Brubeck, Myron L. Riddle, Rhoda E. Rosenblum, Continental Insurance Companies, Helen O. Howland, Gregory R. & Cynthia M. Maschmeyer, Donna L. Lempka, Larry A. Brown, Clarence P. Aday, Harris Nykamp, Robert D. Wilson, Maine Bonding & Casualty Co., David M. Rupp, Floyd E. Flood, Laurence Miller, Kenyon L. Sweitzer, Teresa A. Sutcliffe, Estate of William W. Buckingham--William J. Engel, Administrator, Donna B. Klemm, William A. & Clara E. Collins, William T. Spannagel, Jerry L. Borden, Patricia G. Lee, Arthur V. Spies, Sara C. Cromer, Charles W. Ingland, Donald D. Capodanno, Eagle River Nursing Home, Inc., Horace T. & Elizabeth M. Sullivan, Ronald P. Dawley, Tom Davis Electric Company, Inc., William J. Davis, Arnold F. Mitch, Farmers Insurance Group, Sara E. Locklear, Glen L. Norrington, Mike & Toni M. Ganey, Ernest E. Minch, Dock Burkhart, James F. Bingham, James L. & Nan J. Gerber, Franklin L. & Darlene E. McKnight, George Pradarits, Roy V. Barker, Vondracek TV Company, George E. McInnis, Jason E. Wilson, Henry W. Leeds, Frederick R. & Leonie R. Schroeder, Arthur L. Diamond, Billy A. & Edith M. Foster, Abbot A. Estes, Daniel F. Berry, Sr., Harold W.

Whitford, Sr., Betsy A. Aird, Patsy Ruth Carter, Herbert W. Wright, Tindell F. Tyler, Jerome A. Eureti, R.J. & Theda O. Hosking, Kenneth E. Turner, Sheila J. Newton, Gordon E. Critoph, Crum & Foster Insurance Companies, Ione A. Bazen, David R. Delaney, Dorothy A. Dalton, Lawrence R. Jauch, James W. Knapp, Norman J. Kluska, Vincent Agnifilo, Doris W. Forster, Mildred M. Falkenstein, Radcliffe H. & Lillian T. Smith, Ypsilanti True Value Hardware, Inc., Marchilena Electric Company, Arnold Roberts, Sr., Winifred Gran, Leo F. & Grace E. McCabe, Elizabeth Bradley Persse, Joseph H. Howell, James A. Elsberry, Robert Mahler, Everett Poggi, George A. Qua, Estate of Robert Joel, Patsy M. McCune, Steve W. & Joyce A. Bolton, Cleveland & Betty J. Bias, Kenneth L. & Martha Enders, Gerald J. Marchant, David W. Matthews, John R. Samples, Quentin P. & Elizabeth M.A. Tuggle, Thomas H. Barron, Bruce P. & Nancy E. DiDonato, Sara J. Knapp, Adrienne C. Thurston, Selma E. Bartelds, Edna C. Root, Baby Ruth Henry, and Ray S. Vredenburgh.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

JOHN F. ("JACK") WALSH, et al.,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John F. Walsh, et al., on behalf of themselves and several million owners of model year 1976-1979 and 1980 pre-design change Ford automobiles and light trucks equipped with C-3, C-4, C-6, or FMX auto-

matic transmissions having an excessive tendency to jump from park to reverse, respectfully petition for a Writ of Certiorari to review the Order of the United States Court of Appeals for the District of Columbia Circuit entered in this case on February 9, 1987.

OPINIONS BELOW

The three opinions dealing with the sole issue presented by this petition are reproduced in the Appendix and are (A) Decision of the Court of Appeals denying Appellees' Petition for Clarification, Modification and Rehearing, Walsh v. Ford Motor Co., No. 85-5879 (D.C. Cir. Feb. 9, 1987); (B) Decision of the Court of Appeals vacating and remanding the District Court's class certification decision, Walsh v. Ford Motor Co., No. 85-5879 (D.C. Cir. Dec. 19, 1986) (807 F.2d 1000); and

(C) Decision of the District Court on class certification issues, Walsh v. Ford Motor Co., No. 81-1998 (D.D.C. May 9, 1985) (106 F.R.D. 378).[1] While various other Rule 23 class certification issues were addressed by these decisions, and those issues are currently the subject of renewed class certification proceedings in the District Court on remand from this 28 U.S.C. §1292(b) interlocutory appeal, only the issue of the scope of individual class action pendency notice under the Magnuson-Moss Act is the subject of this petition. See 106 F.R.D. at 409-412; 807 F.2d at 1007-1011. Because the Court of Appeals did not reach the issue of whether due

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[1]Other decisions of the District Court unrelated to this petition are reported at 588 F. Supp. 1513, 592 F. Supp. 1360, 612 F. Supp. 983, 616 F. Supp. 1170, and 627 F. Supp. 1519.

process would require such notice even if the Magnuson-Moss Act does not, that constitutional issue is also not raised by this petition. Compare 106 F.R.D. at 412-414 with 807 F.2d at 1011.

JURISDICTION

The Court of Appeals below issued its final Order (denying timely motion for reconsideration) on February 9, 1987 (App. A), reaffirming its prior decision of December 19, 1986 (App. B), which on an interlocutory appeal vacated and remanded the District Court's class certification decision (App. C). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review the Order of the Court of Appeals by Certiorari.

STATUTORY PROVISIONS INVOLVED

The Magnuson-Moss Consumer Product Warranty Act, 15 U.S.C. §2301 et seq.,

provides in pertinent part:

> §2310(a)(3): One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the [Federal Trade] Commission's rules.... If--
>
> (A) a warrantor establishes such a procedure,
>
> (B) such procedure, and its implementation, meets the requirements of such rules, and
>
> (C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,
>
> then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and (ii) a class of consumers may not proceed in a class action under subsection (d) except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of

rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considering in such a procedure, any decision in such procedure shall be admissible in evidence....

§2310(d)(1): Subject to subsections (a)(3) and (e), a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this title, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief--

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection....

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection--

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interest and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than

one hundred.

§2310(e): No action (other than a class action or an action respecting a warranty to which subsection (a)(3) applies) may be brought under subsection (d) for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a class action respecting a warranty to which subsection (a)(3) applies) brought under subsection (d) for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure [emphasis added].

The Senate Reports on the bill contained no express reference or any specif-

ic provisions relating to class actions. S. Reps. Nos. 93-151 & 93-280, 93d Cong., 2d Sess. (1973). However, the House Report, from which the enacted class action language referred to in §§2310(a)(3), (d)(1), (d)(3), and (e) was drawn, stated:

> The purpose of [the Act's 100 named plaintiffs and other] jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts. However, if the conditions of this section are met . . . [s]ection 110(d) should be construed reasonably to authorize the maintenance of a class action.... [T]his section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers. In particular, assuming that other requirements for a class action are met, your Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of

> the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief.

H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 42, reprinted in 1974 U.S. Code Cong. & Adm. News 7702, 7724 [emphasis added].

This language from the June 13, 1974 House Report was of course before the House-Senate Conference Committee when it issued its Report on December 18, 1974, which stated that "[t]he conferees adopted the House provisions" regarding class actions. S. Conf. Rep. No. 93-1408, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Adm. News 7702, 7755, 7759.

Rule 23(c)(2), Fed. R. Civ. P., provides, as to Rule 23(b)(3) class actions such as this one, that

> the court shall direct to the members of the class the best notice practic-

able under the circumstances, including individual notice to all members who can be identified through reasonable effort.

STATEMENT OF THE CASE

(A) The Parties. The petitioners here are some 200 named plaintiffs and subsequent intervenors representing proposed classes of purchasers or owners of model year 1976-1979 and 1980 pre-design change Fords equipped with C-3, C-4, C-6, or FMX automatic transmissions. The defendant Ford Motor Company is the manufacturer of those allegedly defective vehicles and is a "warrantor" and "supplier" as defined in 15 U.S.C. §§2301(4) and (5), who is subject to suit by plaintiffs under §2310(d)(1).

(B) The Facts. Plaintiffs claim that due to similar design defects in the "manual control systems" of all four of these

Ford automatic transmissions, a Ford driver using ordinary care can place the gear selector lever in what he or she reasonably believes to be the "park" position--because the car acts like it is in "park" (i.e., it stops moving)--yet it is really in an unstable "false park" position from which it may later jump into reverse.

Although this may happen very infrequently with other manufacturers' cars, for Fords there is an extraordinarily high tendency, due to the Ford system's defective design, for the transmission to be left in the "false park" position from which it may then move into reverse after the driver has exited the vehicle. This can happen whether the driver leaves the engine running (e.g., while opening the garage door) or not. If the engine is left running, the car will move in powered re-

verse. If the engine has been turned off, the car after jumping into reverse will roll down an incline if parked on one. The obvious consequence of these park-to-reverse incidents is often serious personal injury or property damage.

The reason why this happens so much more frequently in these Fords than in non-Fords is that the Ford design causes a greater tendency for Ford drivers to leave their gear selector levers in the "false park" position between park and reverse, due to a "double force peak," excessive shift efforts, and other secondary factors. Some further explanation of the mechanical basis of this case, including Ford's knowledge of the defect and its ability to have corrected it at a cost of only a few cents per car, is found in Ford Motor Co. v. Nowak, 638 S.W.2d 582 (Tex.

App. 1982).

(C) The Decision of the District Court. The District Court certified three classes. The first two were "incidents" classes consisting of Ford owners who had actually experienced these "park-to-reverse" incidents. The written warranty "incidents" class related to incidents occurring before expiration of Ford's then 12,000 miles/12 months "written warranty". The implied warranty "incidents" class related mainly to those persons who had park-to-reverse incidents after expiration of the 12,000 miles/12 months written warranty period. Both of these "incidents" classes asserted claims for property damage, and because the number of such class members reasonably identifiable through actual complaints to Ford, government agencies, or others numbered only in the

tens of thousands, plaintiffs had no financial difficulty in pledging to give individual Rule 23(c)(2) notice.

The much larger "all owners" class also certified by the District Court raised the individual notice issue that is the subject of this petition. This class consisted of several million Ford owners (i.e., five to seven million depending on various estimation factors), regardless of whether they had actually experienced a park-to-reverse incident but based upon the alleged excessive probability that they eventually would.

The District Court, citing the express language of the House Committee Report, the adoption of the House class action provisions by the Conference Committee, and floor debate references thereto by Reps. Moss (a chief sponsor), Vanik, and

Badillo, squarely held that Congress had made the "sufficiently clear" expression of legislative intent to modify Rule 23(c)(2) notice requirements in large Magnuson-Moss class actions such as this one. 106 F.R.D. at 409-412. The District Court further considered and properly rejected Ford's argument that Congress could have accomplished this objective even more clearly by a last-minute amendment of the statutory language itself to modify Rule 23(c)(2) notice requirements.

(D) The Decisions of the Court of Appeals. The D.C. Circuit reversed on the Rule 23(c)(2) notice issue, holding essentially that (1) it was not enough that one house of Congress (or even only a few members of that House) may have intended to modify Rule 23(c)(2), (2) the House Committee Report, though not issued until

two weeks after Eisen was decided, might have actually been written earlier and only intended to summarize the drafters' view of pre-Eisen class notice law, and (3) Congress "knew how" to expressly modify Rule 23(c)(2) by language in the statute itself if it had really wanted to do so. 807 F.2d at 1007-1011. Subsequently petitioners' timely motion for reconsideration of this ruling was denied. (App. A.)

REASONS FOR GRANTING THE WRIT

We do not, of course, in this petition seek to review the detailed merits of why the Court of Appeals erred in flouting the absolutely "clear expression" of Congress that Eisen notice requirements were to be relaxed for multi-million member Magnuson-Moss classes. Only a few points are neces-

sary to demonstrate the importance of this issue. The first is that practically every other court or commentator other than the D.C. Circuit panel seems to have thought it clear that this is exactly what Congress intended. See, e.g., In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1135n.50 (7th Cir. 1979) (dictum); Gorman v. Saf-T-Mate, Inc., 513 F. Supp. 1028, 1033 (N.D. Ind. 1981) (dictum); Comment, "The Magnuson-Moss Act Class Action Provisions: Consumers' Remedy or Empty Promise," 70 Geo. L.J. 1399 (1982). Indeed, the D.C. Circuit itself "recognized that "some commentators have interpreted the Act in the manner urged upon us by appellees." (807 F.2d at 1009.)

But the D.C. Circuit panel's decision to the contrary turned most fundamentally

on its view that Congress could have made its "sufficiently clear" intent to modify Rule 23(c)(2) even more clear by inserting the language of the House Committee Report into the statute itself, as it did later that year in the Deepwater Port Act of 1974. (807 F.2d at 1011.) There is no dispute as to that point. The question for this Court, however, is whether a three judge panel of the D.C. Circuit has the authority, under our system of separation of powers, to dictate to the Congress exactly how and by what particular method it must make its intent to modify the Federal Rules "sufficiently clear." It is up to the Congress, not the courts, to determine whether its "sufficiently clear" intent is to be expressed through the legislative history or through the statute itself. Congress does not routinely overturn judi-

cial decisions because they might not have been rendered in the "best manner." The judicial branch owes the same deference to the legislature.

The legislative practicalities in this particular case clearly bear out the wisdom of the Congressional choice of method. Prior to the long awaited decision of this Court in Eisen, the House Committee votes on the basic Magnuson-Moss provisions had already been taken, but the House Committee Report had not yet been issued. After more than five years of legislative deliberations, for Congress to have dealt with Eisen in the statute itself would have required sending the bill back to Committee for further amendment, which would probably have doomed its passage during that session. It was therefore eminently reasonable for Congress to have

made its "clear expression" known through the unambiguous Committee Report language on such a procedural issue that has only been litigated in the dozen years' history of Magnuson-Moss in this one case.

The D.C. Circuit panel seemed fixated with the notion that maybe the Senate did not know what the House was doing vis-a-vis Rule 23(c)(2) notice requirements as construed in Eisen. Yet as previously noted, the House-Senate Conference Committee expressly adopted the House class action provisions--the Senate not even having had any express class action provisions in its bill. The House Committee Report explaining the unequivocal position as to the possible inapplicability of Eisen to certain large Magnuson-Moss classes was squarely in front of every Senate member of the Conference Committee

when it voted to "adopt the House provisions."

In an even more remarkable effort to confuse the obvious, the D.C. Circuit panel also surmises that the language of the House Committee Report about Eisen had somehow been "penned prior to the Supreme Court's decision in Eisen." (807 F.2d at 1009-1010.) Yet this Committee Report was dated more than two weeks after Eisen was decided, and in the very same document the "Minority Views" of the dissenters on this issue did specifically discuss Eisen by name. Obviously, if by the time the Report was issued the Minority knew about Eisen, so did the Majority. Indeed, this timing is exactly what demonstrates that what the Majority was talking about was Eisen itself and not pre-Eisen class notice law, as the D.C. Circuit wishfully thinks.

The Court of Appeals takes great pains to dispute petitioners' "tortured" and "untenable" view that because 15 U.S.C. §2310(e) mentions certain aspects of Rule 23, the other aspects therefore do not apply to federal Magnuson-Moss class actions. (807 F.2d at 1009.) This was not petitioners' position at all. We argued only that the mention in §2310(e) of some but not other parts of Rule 23 created sufficient ambiguity as to which parts applied to warrant resort to the legislative history for further guidance. This was precisely the approach taken in In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1134-1135n.50 (7th Cir. 1979), to determine by looking to the legislative history whether Rule 23(e) is applicable to Magnuson-Moss class actions, and that very decision was cited

with approval by the D.C. Circuit as to that approach. (807 F.2d at 1009n.55.)

Of course, once it is determined that there is sufficient ambiguity in the statutory references to Rule 23 to resort to the legislative history, what Congress intended as to the applicability of Eisen to Magnuson-Moss class actions becomes unmistakably clear.

Ironically, in another aspect of its decision not challenged in this petition, the D.C. Circuit contradicts its own logic as to the necessity of explicit language in the statute itself as distinguished from the legislative history. The District Court had held that because the Act contains its own explicit definitions of "written warranty" (15 U.S.C. §2301(6)), Congress had created a federal standard in that area. Although there was no ambigui-

ty whatever in the statute itself to suggest otherwise, the D.C. Circuit nonetheless consulted the Conference Report to conclude that the governing standard was whether "under State law a warrantor...is deemed to have made a written affirmation, promise, or undertaking." (807 F.2d at 1015-1016 (emphasis added).) Thus, the D.C. Circuit has squarely held that unambiguous statutory language can be negated through statements in a Conference Report. Why then cannot ambiguous references to the applicability of Rule 23 be interpreted through language in a House Report that was adopted in relevant part by the Conference Committee? Even if the D.C. Circuit is ultimately found to be correct on this important issue, it would not be because Congress fell "far short" of the necessary "clear expression;" rather, un-

der the D.C. Circuit's own logic Congress could have fallen short by only the very narrowest margin.

CONCLUSIONS

For all of the foregoing reasons, the petition for certioari should be granted.

Dated: May 11, 1987

Beverly C. Moore, Jr.
MOORE & BROWN
4900 Massachusetts Avenue, N.W.
Suite 205
Washington, D.C. 20016
(202) 364-1032

Landon Gerald Dowdey
LAW OFFICES OF LANDON GERALD DOWDEY
310 Metropolitan Square
Wasington, D.C. 20006
(202) 639-8687

William H. McDonald
John E. Price
WOOLSEY, FISHER, WHITEAKER, ET AL.
300 South Jefferson
Springfield, MO 65806
(417) 869-0581

Charles R. Watkins
SACHNOFF WEAVER & RUBENSTEIN
30 South Wacker Drive
Chicago, IL 60606
(312) 207-6480

Counsel for Petitioners

APPENDIX

APPENDIX A

United States Court of Appeals
For The District of Columbia Circuit

September Term, 1986
CA No. 81-1998

No. 85-5879

JOHN F. "JACK" WALSH, *et al.*
v.

FORD MOTOR COMPANY

FILED FEB 9 1987

GEORGE A. FISHER
CLERK

BEFORE: EDWARDS, RUTH B. GINSBURG and STARR, Circuit Judges

O R D E R

Upon consideration of appellees' petition for clarification, modification and rehearing, filed January 20, 1987, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: ROBERT A. BONNER
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5879

JOHN F. "JACK" WALSH, et al., APPELLEES

v.

FORD MOTOR COMPANY, APPELLANT

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-01998)

Argued September 18, 1986

Decided December 19, 1986

Richard C. Warmer and *William T. Coleman, Jr.*, with whom *Carl R. Schenker, Jr.*, *John H. Beisner*, *Aaron S. Bayer* and *Barbara L. Strack* were on the brief for appellant.

Beverly C. Moore, Jr., with whom *Landon Gerald Dowdey* was on the brief for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before EDWARDS, RUTH B. GINSBURG and STARR, *Circuit Judges.*

Opinion for the Court by EDWARDS, *Circuit Judge,* and RUTH B. GINSBURG, *Circuit Judge.*

EDWARDS, *Circuit Judge* and RUTH B. GINSBURG, *Circuit Judge*: Plaintiffs-Appellees, who proposed to represent several million owners of Ford automobiles, initiated the instant suit against Ford Motor Company to pursue breach of warranty claims by means of class actions. The appellees' suit arises under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss" or the "Act");[1] the essence of appellees' complaint is that certain Ford models suffer from a transmission defect that causes the automobiles to slip out of the "park" position and into "reverse."

In order to obtain class action certification under Rule 23 of the Federal Rules of Civil Procedure, appellees grouped their breach of warranty claimants into three principal categories: one group ("written warranty incidents" class) included all Ford owners who had allegedly experienced a "park-to-reverse" incident within Ford's 12,000 mile/12 month written warranty period; the second group ("implied warranty incidents" class) included every Ford owner who allegedly experienced a park-to-reverse incident; and the third group ("all-owners" class) included all owners of an allegedly defective Ford vehicle, without regard to whether the owner had ever experienced a park-to-reverse incident. Citing a variety of legal objections, Ford opposed class certification; in particular, Ford argued that none of the appellees' proposed claimant groups was a cognizable "class" under Rule 23.

Although the District Court recognized that appellees' proposed class groupings raised some difficult legal issues under Rule 23, the trial judge nevertheless conditionally

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[1] 15 U.S.C. §§ 2301-2312 (1982).

certified all three classes. The District Court decided to apply Rule 23 only where it is consistent with the terms and intent of Magnuson-Moss; therefore, having found that Magnuson-Moss reflects a congressional intent liberally to allow class actions as a device to facilitate consumers' recovery for breach of warranties, the District Court concluded that appellees' proposed classes should be certified as suggested. The effect of this ruling was to allow appellees to avoid the strict requirements of class certification under Rule 23.

Given the importance of the legal questions at issue, and the enormity of the litigation presently contemplated, the District Court approved appellant's request for interlocutory review under 28 U.S.C. § 1292(b). On November 7, 1985, this court granted interlocutory appeal on the issue of class certification.[2]

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[2] The decision whether to grant an interlocutory appeal from an *order* of a district court under § 1292(b) is within the discretion of the court of appeals. Before the court of appeals may exercise that discretion, however, the district court must certify that the order involves "a controlling question of law as to which there is substantial ground for difference of opinion," and that an immediate appeal "may materially advance the ultimate termination of the litigation." In the instant case, the District Court certified as "controlling" only one of the legal issues that we deem it necessary to address on appeal. *See* Memorandum Opinion, *reprinted in* Record Excerpts ("R.E.") Tab 8 (certifying the question whether class representatives in class actions brought under Magnuson-Moss are required to send individual notice to all class members whose names and addresses may be ascertained through reasonable effort). Section 1292(b) explicitly provides, however, that the appeal is from an *order* of the district court, not from the particular question that the district court found controlling. We are therefore called upon to decide an appeal, not a single question of law. Accordingly, we must decide *all* questions of law necessary to the proper disposition of this appeal. *See, e.g., Nuclear Eng'g Co. v. Scott*, 660 F.2d 241, 246 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982);

Because we find that the District Court's decision to certify appellees' classes was based in significant part on an improper construction of Magnuson-Moss, rather than on a normal application of Rule 23, we vacate and remand for further consideration as to whether any class certification is appropriate under unmodified Rule 23 standards.

I. BACKGROUND

A. *Factual Background*

The plaintiffs-appellees brought this action under section 110 of Magnuson-Moss,[3] alleging that the defendant-appellant, Ford Motor Company, breached both its implied and written warranties of merchantability by marketing defectively designed automobiles. In particular, the appellees alleged that 1976-79 (and 1980 pre-design change) Ford vehicles equipped with FMX, C-3, C-4 and C-6 automatic transmissions suffer from a defect that causes the automobiles to slip out of the "park" position and into "reverse."[4] The appellees, claiming to repre-

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Johnson v. Alldredge, 488 F.2d 820, 822-23 (3d Cir. 1973), *cert. denied*, 419 U.S. 882 (1974). Neither party to this appeal disputes this well-established principle.

[3] 15 U.S.C. § 2310 (1982).

[4] In 1977, in response to similar complaints of park-to-reverse incidents involving Ford automobiles, the National Highway Traffic Safety Administration ("NHTSA") initiated an investigation to determine whether Ford transmissions were defective. That investigation culminated in a settlement in which Ford agreed to send warning labels to Ford owners instructing them to place their transmissions securely in "park," turn off the engine and set the parking brake before leaving their car. *See Center for Auto Safety, Inc. v. Lewis*, 685 F.2d 656, 661 (D.C. Cir. 1982). NHTSA did not, however, make a final determination under 15 U.S.C. § 1412(b) (1982) that the Ford transmissions were defective. 685 F.2d at 662-63. In the absence of such a final determination, this court rejected a challenge by the Center for Auto Safety to

sent several million Ford owners, sought to pursue their breach of warranty claims by means of class actions. For the purpose of obtaining class action certification, they grouped their principal claims into three broad categories. The first group ("written warranty incidents" class) consisted of all Ford owners who allegedly experienced a park-to-reverse incident within Ford's 12,000 mile/12 month written warranty period. This group sought certification under Rule 23(b)(3) to recover property damages incurred in these incidents.[5] The second group ("implied warranty incidents" class) consisted of all Ford owners who allegedly experienced a park-to-reverse incident. This group also sought certification under Rule 23(b)(3) to recover property damages. The third group ("all-owners" class) consisted of *all* owners of an allegedly defective Ford vehicle, without regard to whether the owner had experienced an actual park-to-reverse incident.[6] This group sought certification under Rule 23(b)(3) to recover damages equal to the difference in value between the transmissions as received and as warranted; or, in the alternative, certification under Rule 23(b)(2) to compel Ford to repair the defective vehicles.[7] The appellees also asked the District Court

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the authority of NHTSA to settle the case without compelling Ford to repair or replace the allegedly defective transmissions. *Id.*

[5] FED. R. CIV. P. 23(b)(3) authorizes a district court to certify a class if it finds that questions of law or fact common to the class predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

[6] This proposed class consisted primarily of Ford owners raising implied warranty claims. However, the class also included members of the proposed "written warranty incidents" class.

[7] FED. R. CIV. P. 23(b)(2) authorizes a district court to certify a class to pursue injunctive or declaratory relief if it

to certify two additional "incidents" classes, one to recover punitive damages and the other to pursue personal injury claims.

Before the District Court, Ford opposed class certification on numerous grounds.[8] Under Rule 23(b)(3), Ford observed, a district court may not certify a class unless it finds that "questions of law or fact common to the members of the [proposed] class predominate over any question affecting only individual members." With respect to the implied warranty classes, Ford argued, it could not be found that common questions of *law* predominated, because Magnuson-Moss defines implied warranties as those arising under state law,[9] and there are material variations in state laws governing the interpretation of implied warranties.[10] With respect to *all* the proposed classes, Ford argued, it could not be found that

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finds that the defendant "has acted or refused to act on grounds generally applicable to the class." Rule 23(b)(2) may not be invoked, however, where "the appropriate final relief relates exclusively or predominantly to money damages." FED. R. CIV. P. 23(b)(2) advisory committee's note (1966 amendment).

[8] Ford has renewed these arguments with equal vigor on appeal.

[9] *See* 15 U.S.C. § 2301(7) (1982).

[10] In particular, Ford identified supposed variations in state laws governing what constitutes a breach of implied warranty, what constitutes sufficient notice of breach, the validity of durational limitations and the availability of affirmative defenses. *See* Brief of Appellant at 35-37.

At an earlier stage of the litigation, the District Court had recognized that states differed on the question whether a party not in vertical privity with a manufacturer may recover from the manufacturer for breach of implied warranty. In light of this problem, the District Court excluded from the proposed implied warranty classes those members who resided in states that required vertical privity. *See Walsh v. Ford Motor Co.*, 588 F. Supp. 1513, 1524-35 (D.D.C. 1984).

common questions of *fact* predominated, because the appellees had not proffered any proof that the four different transmissions (the FMX, C-3, C-4 and C-6) suffered from a common defect.[11] With respect to the "incidents" classes, Ford argued, it again could not be found that common questions of fact predominated, because each plaintiff would be required to make an individual showing that her accident was caused by Ford's allegedly defective design.

Ford also argued that certification of an "all-owners" class was improper in light of the appellees' concession that they could not bear the cost of providing individual notice of the action to the several million absentee class members. As interpreted in *Eisen v. Carlisle & Jacquelin*, Ford observed, Rule 23(c)(2) requires proposed plaintiff class representatives to send individual notice to all class members whose names and addresses may be ascertained through reasonable effort, irrespective of the financial burden placed on the plaintiffs by this requirement. 417 U.S. 156, 176 (1974) ("[I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. . . . There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.") In addition, Ford argued, individual notice was required by procedural due process, for without such notice, absentee class members would be deprived of the opportunity to be heard or to opt out of the litigation.

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[11] Ford also contended that the four transmission types had been used in connection with numerous column designs and linkage systems, all of which operated in tandem to control the shifting of gear positions between "park" and "reverse." Thus, Ford claimed, there were approximately 20 different transmission *systems*, each of which would have to be examined separately to determine if the *system* was defective. *See* Brief of Appellant at 54-55.

B. *The District Court's Opinion*

The District Court found that none of the above arguments foreclosed class certification under Rule 23(b)(3). Accordingly, the trial judge conditionally certified an "all-owners" class,[12] an "implied warranty incidents" class and a "written warranty incidents" class.[13]

Before addressing Ford's Rule 23 arguments, however, the District Court examined the statutory framework of Magnuson-Moss to determine the extent to which Rule 23 applies to class actions brought under the Act. Section 110 of the Act establishes jurisdictional requirements for

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[12] The District Court rejected the appellees' alternative motion for certification of a Rule 23(b)(2) recall/retrofit equitable relief class, finding that the principal relief they sought was damages. *Walsh v. Ford Motor Co.*, 106 F.R.D. 378, 391-92 (D.D.C. 1985); *see* note 7 *supra*.

[13] *Walsh*, 106 F.R.D. at 414. The District Court did not certify either a personal injury incidents class or a punitive damages incidents class. It explicitly rejected certification of a personal injury class, finding that the appellees' personal injury claims, unlike their Magnuson-Moss warranty claims, arose "*exclusively*" under state law. *Id.* at 405 (citing 15 U.S.C. § 2311(b)(2), which provides that personal injury claims may not be brought under Magnuson-Moss) (emphasis in opinion). The court found that the application of "56" potentially variant state laws would present "intractable management problems." *Id.* While the Magnuson-Moss claims also presented "formidable" manageability problems, the court felt obliged to tackle those problems "because of the expressed intent by Congress to afford consumers effective methods to pursue their claims for breach of warranty through the class-action vehicle." *Id.*

The court reserved judgment on the punitive damages class pending briefing on the question whether punitive damages are available under Magnuson-Moss. *Id.* at 408-09. The court has since refused to certify a punitive damages class, finding that Magnuson-Moss does not displace the various state laws on the availability of punitive damages for breach of warranty. *Walsh v. Ford Motor Co.*, 627 F. Supp. 1519, 1522-26 (D.D.C. 1986).

a class action brought in federal district court. In particular, the Act requires that there be at least 100 named plaintiffs, that each individual claim exceed $25 and that the aggregate claims exceed $50,000.[14] The Act also provides that a plaintiff may *file* a class action, but may not *proceed* with that action, until she has afforded the defendant a reasonable opportunity to cure its alleged breach. While the class action is held in abeyance pending possible cure, the district court may rule on the representative capacity of the named plaintiffs, its determination to be made "in the application of rule 23 of the Federal Rules of Civil Procedure." [15]

The appellees contend that these statutory provisions evince a congressional intent that Rule 23 should apply to Magnuson-Moss class actions only to the extent necessary to determine the representative capacity of the named plaintiffs. Congress, they argue, would not have explicitly mentioned Rule 23 in a particular context had it meant for Rule 23 to apply across the board.[16] The fact that Congress specified the circumstance under which Rule 23 would apply, and delineated the jurisdictional requirements for a class action in federal court, purportedly suggests that Congress may have intended to

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[14] 15 U.S.C. § 2301(d)(3) (1982).

[15] *Id.* § 2310(e).

[16] *See* Brief of Appellees at 16-17. *See also* C. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT 100 (1978) ("Since no mention of Rule 23 is made anywhere else in the Act, unless this sentence is treated as a meaningless redundancy, it can only signal that the remainder of Rule 23 does not apply."); Statutory Commentary, *The Magnuson-Moss Act Class Action Provisions: Consumers' Remedy or an Empty Promise?*, 70 GEO. L.J. 1399, 1409 (1982).

As will be made clear later in this opinion, we find appellees' contention on this point to be specious. There is no warrant to find that Congress intended to eliminate the requirements of Rule 23 with the passage of Magnuson-Moss.

create a " 'self-contained' class action regime" under which those portions of Rule 23 not explicitly mentioned in the statute would not apply.[17]

The District Court wisely rejected this contention, refusing to "read section 110 [15 U.S.C. § 2310 (1982)] so broadly as to have it supersede the Rule 23 class action provision." [18] *However*, the court did interpret Magnuson-Moss as mandating a somewhat looser application of Rule 23. In particular, the court found that it should apply Rule 23 only where "it is consistent with the terms and intent of Magnuson-Moss." [19]

In accordance with this view, the District Court set out to apply Rule 23 "against the backdrop of Magnuson-Moss and Congress' intent to provide class actions as a form of recovery to consumers for breach of written and implied warranty." [20] First, the court rejected Ford's argument that material variations in the Ford transmissions precluded a finding that common questions of fact predominated. As to the four transmission *types*, the court reserved judgment on whether the appellees could prove that the transmissions were "sufficiently and materially similar so as to permit them to be included in a single class." [21] It did find, however, that the appellees had "credibly alleged" common defects as to the four transmissions.[22] The court found that it could separate each transmission type into a subclass if it concluded at a later stage of the litigation that such a division was necessary. As to the more numerous transmission *systems*, the court was "not convinced" that the differences

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[17] Brief of Appellees at 18-19.

[18] *Walsh*, 106 F.R.D. at 387.

[19] *Id.*

[20] *Id.* at 388.

[21] *Id.* at 394.

[22] *Id.* at 395.

alleged by Ford were "material enough" to prevent class-wide proof on the issue of defective design.[23] Again, the court appeared to reserve the option of subdividing classes at a later date should its initial judgment prove erroneous.

Second, the court refused to accept Ford's argument that state law variations precluded a finding that common questions of law predominated. Importantly, the court did not reject Ford's contention that state law variations existed. Rather, the court found it unnecessary for purposes of class certification to decide *which* state law applied,[24] maintaining that "[t]o conclude that a court must look to the many States, with their varying judicial interpretations of what constitutes breach of implied warranty, would make it virtually impossible to apply the Act in multi-State class actions for Magnuson-Moss breach of implied warranty claims." [25] The court thus concluded that it could not deny class certification because of "potential" state law variations, for to do so would, in effect, repeal a "congressionally-mandated Federal cause of action." [26] The court further concluded that potential state law variations did not bar certification of a *written* warranty class, because Magnuson-Moss "explicitly defines written warranty and establishes a cause of action for breach of said warranty." [27]

Third, the court found that individual issues of causation did not bar certification of an "implied warranty incidents" class. To overcome the existence of individual causation issues, the court opined, the appellees could

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[23] *Id.*

[24] *Id.* at 396 n.12.

[25] *Id.* at 396.

[26] *Id.* at 395.

[27] *Id.* at 404 (citing 15 U.S.C. §§ 2301(6), 2302-2304, 2310 (d)(1) (1982)).

rely on class-wide technical and statistical proof demonstrating that Ford vehicles experienced an extremely high rate of park-to-reverse incidents and suffered from common defects in their transmissions.[28] Combined with direct proof that intervening causes were unlikely, this evidence could establish a "*prima facie* presumption" that *each* park-to-reverse incident was attributable to Ford's defective transmission design.[29] Such a "rebuttable presumption," the court found, would be consistent with the remedial purposes of the Act.[30] To require instead that the members of the proposed incidents class "prove individually that the design defect was the cause in fact of a 'park-to-reverse incident' would surely preclude the use of class action procedures for breach of implied warranty under the Magnuson-Moss Act." [31]

Finally, the court held that it could certify an "all-owners" class without requiring the appellees to provide individual notice of the action to absentee class members. Relying principally on a passage from a House Committee Report, the court found that Congress had intended for *Eisen* not to apply to class actions brought under Magnuson-Moss.[32] At the conclusion of its discussion of *Eisen*, the court characterized its decision with respect to individual notice, as well as with respect to the other class certification issues, as an attempt "to effect [the Act's remedial] purposes by providing a reasonable interpretation of the Act." [33] The court went on to find that the appellees' inability to provide individual notice would not deprive absentee class members of procedural due

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[28] *Id.* at 399.

[29] *Id.*

[30] *Id.* at 402.

[31] *Id.*

[32] *Id.* at 409-11.

[33] *Id.* at 412.

process, because the absentee class members were adequately represented, which is all that due process requires.[34]

II. Discussion

A. *The Interplay Between Rule 23 and Magnuson-Moss*

We recognize that certain aspects of a district court's determinations under Rule 23—such as whether common questions of fact or law predominate—are entitled to a measure of deference from an appellate court.[35] However, it is unquestionably the role of an appellate court to ensure that class certification determinations are made pursuant to appropriate legal standards.[36] In the instant case, we find that the District Court's class certification rulings were made under an erroneous legal standard, and must therefore be reversed.

A consistent theme pervading the trial court's opinion is that the remedial purposes of Magnuson-Moss compelled it to bend the requirements of Rule 23 in order to facilitate the maintenance of a class action. Nothing in Magnuson-Moss, however, licenses a district court to manipulate Rule 23 in order to ensure the pursuit of a class action in federal court. Although the Act creates federal jurisdiction over class actions that meet specified

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[34] *Id.* at 412-13.

[35] *See, e.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.) (en banc) ("If the district court has properly identified the issues common and diverse, we would undoubtedly defer in most instances to its conclusion as to predominance, since that requirement relates to the conservation of litigation effort, and the trial court's judgment probably will be as good as ours."), *cert. denied*, 419 U.S. 885 (1974).

[36] *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100-01 (1981) (district court's discretion to administer class actions is bounded by the relevant provisions of the Federal Rules, and exercise of this discretion is subject to appellate review); *Katz*, 496 F.2d at 756 (appellate court must decide whether mandates of Rule 23 have been satisfied).

jurisdictional requirements,[37] it plainly does not *mandate* that district courts entertain such actions regardless of whether they are cognizable under Rule 23. Congress passed Magnuson-Moss in part to create additional remedies for breach of warranty, and to allow for the *possibility* of class actions in federal court. Congress' primary purpose in enacting Magnuson-Moss, however, was to provide minimum disclosure and content standards particularly for written warranties, *not* to actively promote class actions in federal court.[38]

In short, the District Court was required to analyze the appellees' motion for class certification under traditional Rule 23 standards. We flatly reject the District Court's assessment that Rule 23 may be applied less stringently in Magnuson-Moss cases in order to effectuate the statute's remedial purposes.[39] The Federal Rules of

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[37] 15 U.S.C. § 2310(d)(1)(B) (1982).

[38] The Act itself is entitled "AN ACT [t]o provide minimum disclosure standards for written consumer product warranties; to define minimum Federal content standards for such warranties; to amend the Federal Trade Commission Act in order to improve its consumer protection activities; and for other purposes." Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975); *see also* C. REITZ, *supra* note 16, at 23 ("The principal threefold purposes of the Magnuson-Moss Warranty Act, declared in the Act itself, are 'to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products.' ") (citing 15 U.S.C. § 2302(a)); *id.* at 1 ("The Act is also concerned with the means of vindicating the warranty rights of buyers . . . . This is accomplished mainly by providing easy and realistic access by aggrieved consumers to *state* courts.") (emphasis added).

[39] *Cf. Board of Governors v. Dimension Fin. Corp.*, 106 S. Ct. 681, 688-89 (1986):

> The "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of

Civil Procedure are to be applied in all civil actions absent a *direct expression* of congressional intent to the contrary.[40] As will be discussed more fully below, Magnuson-Moss contains no such direct expression. For this reason, and for the reasons that follow, we must remand this case to the District Court to determine what classes, if any, may be certified *under Rule 23.*

B. *Individual Notice*

The District Court's most conspicuous departure from Rule 23 standards was its decision to relieve the appellees of their obligation to provide individual notice to all members of the proposed "all-owners" class. Rule 23(c)(2), as interpreted by the Supreme Court in *Eisen*, requires that individual notice be sent to all class members whose names and addresses may be ascertained through reason-

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> the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

(citation omitted).

[40] *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979); *cf. East Texas Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405 (1977) (although suits alleging racial or ethnic discrimination are often by their very nature class suits, careful attention to the requirements of Rule 23 remains indispensable); *Windham v. American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc) (rejecting view of panel opinion, 539 F.2d 1016, 1021, that remedial purposes of Sherman Act created a "rebuttable presumption" in favor of class action treatment for anti-trust suits; such a view would conflict with the rule

able effort.[41] The appellees did not contend before the District Court that they would be unable to identify the absentee class members through reasonable effort. Rather, they maintained that they would be financially unable to send the requisite notice. *Eisen*, however, explicitly held that individual notice is an absolute requirement of Rule 23(c)(2), not to be "tailored to fit the pocketbooks of particular plaintiffs."[42] Accordingly, unless *Eisen* is somehow inapplicable to class actions brought under Magnuson-Moss, the District Court erred in relieving the proposed representatives of the "all-owners" class of their obligation to provide individual notice to absentee class members.

As noted above, the Supreme Court has held that the Federal Rules of Civil Procedure are to be applied in all civil actions absent a "direct expression" of congressional intent to the contrary.[43] The statutory language of Magnuson-Moss contains no reference to Rule 23(c)(2) or to *Eisen*, much less a "direct expression" that the requirement of individual notice is not to obtain in class actions brought under the Act. When Congress has meant to limit *Eisen* it has known precisely how to do so, as evidenced by its treatment of the notice requirement in the Deepwater Port Act of 1974. In that Act, Congress specified in the statute that when the size of the proposed class exceeded one thousand, Rule 23(c)(2) would be satisfied by notice in the *Federal Register* and in local newspapers.[44] Magnuson-Moss contains no comparable

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that the proponent of class certification bears the burden of establishing the right to certification under Rule 23), *cert. denied*, 435 U.S. 968 (1978).

[41] 417 U.S. at 173.

[42] *Id.* at 176.

[43] *Califano*, 442 U.S. at 700.

[44] 33 U.S.C. § 1517(i)(2) (1982).

language evincing a congressional intent to modify Rule 23(c)(2).

The District Court, however, found the requisite "direct expression" of congressional intent in the legislative history of Magnuson-Moss. The court relied principally on the following language contained in the Report of the House Interstate and Foreign Commerce Committee:

> The purpose of [the Act's] jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts. However, if the conditions of this section are met . . . [s]ection 110(d) should be construed reasonably to authorize the maintenance of a class action. . . . [T]his section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers. In particular, assuming that other requirements for a class action are met, your Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. *In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief.*[45]

Although the House Committee Report did not mention *Eisen* by name,[46] the trial court read the above language as an indication that Congress meant for *Eisen* not to

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[45] H.R. REP. No. 1107, 93d Cong., 2d Sess. 42, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7724 (emphasis added).

[46] *Eisen* was decided on May 28, 1974. The House Committee Report was dated June 13, 1974.

apply in Magnuson-Moss class actions.[47] As further support for this view, the trial court cited the floor statements of two House members, one of which explicitly mentioned *Eisen*, and both of which embraced the views expressed in the House Report.[48] Finally, the court noted that the Senate-House Conference Committee had adopted the class action provisions contained in the House bill,[49] inferring from this that the Senate concurred in the views expressed in the House Report.

There is a firm presumption that the Federal Rules of Civil Procedure apply in all civil actions; nothing in Magnuson-Moss itself indicates that Congress meant to vitiate or reduce the requirements of Rule 23. The legislative history appellees cite, even if it is properly proposed for our consideration,[50] falls far short of a "direct expression" that Congress intended to truncate the Rule or overrule *pro tanto* the Supreme Court's decision in *Eisen*.

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[47] *Walsh*, 106 F.R.D. at 410. Importantly, this passage, relied upon heavily by the District Court as evidence of the need to decide class certification issues in a manner consistent with the statute's remedial purposes, *see* 106 F.R.D. at 386, 410-12, states that a class action may be brought in federal court if the statute's jurisdictional requirements are satisfied *and* if the "other requirements for a class action are met." This language surely does not indicate that Congress intended to displace Rule 23 in class actions brought under the Act.

[48] *Id.* at 410 (citing 120 CONG. REC. 31,738 (1974) (statement of Rep. Vanik); 120 CONG. REC. 32,013 (1974) (statement of Rep. Badillo) (extension of remarks)).

[49] *Id.* (citing S. CONF. REP. No. 1408, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7759). The Senate version of the bill, S. 356, made no specific mention of class actions. *See* S. REP. No. 151, 93d Cong., 1st Sess. 37-38 (1973).

[50] *Cf., e.g., Washington Water Power Co. v. FERC*, 775 F.2d 305, 315 (D.C. Cir. 1985) ("The Act itself is sufficiently clear on its face so as not to require or authorize recourse to legislative history.").

The appellees would have us rely on that portion of the statute providing that "the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure." [51] According to the appellees, the specific mention of Rule 23 in a particular context suggests a congressional intent to dispense with Rule 23 requirements in all other contexts. At a minimum, they argue, the explicit mention of Rule 23 creates an ambiguity concerning *which portions* of Rule 23 Congress meant to apply in Magnuson-Moss class actions.[52]

Although we recognize that some commentators have interpreted the Act in the manner urged upon us by appellees,[53] we firmly reject the suggestion that Magnuson-Moss was intended to preclude application of any Rule 23 requirements. Appellees' argument to the contrary is based on a tortured and, in our judgment, untenable reading of the Act. Before any action—including a class action—alleging breach of warranty under Magnuson-Moss may proceed, the plaintiffs must afford the defendant a reasonable opportunity to cure its alleged breach. Under section 110(e), however, a class action may proceed at an earlier time for the limited purpose of establishing the representative capacity of the named plaintiffs.[54] Section 110(e) further provides that this *initial* determination of representative capacity is to be made in accordance with Rule 23 standards. The obvious reason for the statutory reference to Rule 23, then, was to clarify that courts are to apply the same standards in making the Magnuson-Moss *initial* determination of representative capacity as would otherwise be applied in a typical Rule 23 proceeding. We refuse to believe that Congress,

[51] 15 U.S.C. § 2310(e) (1982).

[52] Brief of Appellees at 16-17.

[53] *See* note 16 *supra*.

[54] 15 U.S.C. § 2310(e) (1982).

in clarifying that Rule 23 would apply to an initial determination of representative capacity, intended, *sub silentio*, to render the remainder of Rule 23 inapplicable.[55]

To the extent that recourse to legislative history is appropriate, however, we again fail to discern any "direct expression" of congressional intent to eliminate the individual notice requirement as interpreted by the Supreme Court in *Eisen*. The most persuasive piece of legislative history cited by the appellees is the passage in the House Report in which a majority of Committee members opined that the requirement of individual notice should not be permitted to burden the maintenance of class actions under Magnuson-Moss. These views, however, apparently were penned prior to the Supreme Court's decision in *Eisen*, as evidenced by the fact that the majority conspicuously failed to mention *Eisen* by name.[56] It seems

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[55] *Cf. In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1134-35 n.50 (7th Cir.) ("The explicit mention of the applicability of Rule 23 bolsters our conclusion that Rule 23(e) [governing approval of class action settlements] is applicable to class actions maintained under [Magnuson-Moss]."), *cert. denied*, 444 U.S. 870 (1979).

[56] As noted earlier, *see* note 46 *supra*, the House Report was issued approximately two weeks after the decision in *Eisen*. It is evident, however, that the Committee had no opportunity to evaluate the impact of *Eisen* on class actions brought under Magnuson-Moss. Indeed, after *Eisen* was decided, a minority of committee members appended their separate views to the Committee Report, explicitly noting that

> This bill addresses only the jurisdictional questions involving the use of class actions in breach of warranty cases. The Committee did not address the questions involved with the requirements of Rule 23 and, inasmuch as the United States Supreme Court in the recent *Eisen* case made it clear that "the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort", we feel that those whose

most likely that the Committee, far from seeking to displace any Rule 23 requirement, was simply indicating what the legislators thought the Rule meant prior to the Supreme Court's definitive interpretation in *Eisen*.

Of greater significance is the fact that the House Committee's views on individual notice were never considered or adopted by the full Congress. As the District Court observed, the Senate-House conferees adopted the class action provisions contained in the House bill.[57] However, neither the statutory language agreed upon in conference nor the Conference Committee Report [58] made any reference to Rule 23(c)(2) or *Eisen*.[59] At most, then, the House Committee's desire to soften the individual notice requirement was shared only by members of the House, perhaps only by a majority of the House Committee. The

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rights are potentially affected by a class action are now protected by that notice.

H.R. REP. NO. 1107, 93d Cong., 2d Sess. 88, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7753-54.

[57] *Walsh*, 106 F.R.D. at 410.

[58] Statements in conference committee reports are "particularly weighty" indicators of congressional intent, as they reflect the final legislative compromise between the delegations from the two Houses of Congress. *Planned Parenthood Fed'n v. Heckler*, 712 F.2d 650, 657-58 n.36 (D.C. Cir. 1983) (quoting Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 201 & n.49 (1983)).

[59] As noted earlier, *see* note 49 *supra*, the Senate bill made no special provision for class actions. Indeed, under the jurisdictional requirements imposed by the Senate bill, class actions in federal court would have been virtually impossible. *See* note 60 *infra*. The compromise reached in Congress was to alter the Senate's jurisdictional requirements in order to create the *possibility* of class actions in federal court. *Id.* There is absolutely no evidence that the conferees considered the question whether Rule 23(c)(2), as interpreted in *Eisen*, applied to class actions brought under the Act.

matter was never pursued in the Senate, either by means of statutory amendment or in the Conference Committee Report. More important, *neither* body of Congress focused on the applicability of *Eisen* to class actions brought under Magnuson-Moss, much less expressed a definite intent that *Eisen* not apply.[60]

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[60] We assign no value to the statements of Representatives Vanik and Badillo, who were neither sponsors of the bill nor members of the committee which reviewed the legislation. Their isolated comments about individual notice reflect their personal views of the legislation rather than the intent of the legislative body. *Cf. Castaneda-Gonzalez v. Immigration and Natur. Serv.*, 564 F.2d 417, 424 (D.C. Cir. 1977) ("Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body.").

The appellees also point to a statement by Representative Moss, who *was* a sponsor of the legislation. After the bill emerged from conference, Representative Moss explained to his colleagues that

> In order that [a breach of warranty] suit be brought in a Federal district court, the amount in controversy would have to exceed $50,000 and each individual claim would have to exceed $25. The [conference] report authorizes class actions, provided these conditions are met and also where there are at least 100 named plaintiffs notwithstanding any restrictions on such actions which might exist under general principles of Federal law.

120 CONG. REC. 41,405-06 (1974).

According to the appellees, one of the "restrictions" to which Magnuson-Moss class actions would not be subject was the requirement of individual notice. From the context of Representative Moss' remarks, however, it is clear that he was not referring to Rule 23 or the individual notice requirement. Under the Senate bill, a breach of warranty claim could only be brought in federal court under 28 U.S.C. § 1331. *See* S. REP. NO. 151, 93d Cong., 1st Sess. 38 (1973). At that time, 28 U.S.C. § 1331 had been interpreted to require each member of a proposed class to assert a claim in excess of $10,000. *See Zahn v. International Paper Co.*, 414 U.S. 291 (1973). In conference, this potentially insuperable obstacle to federal court jurisdiction over class actions was removed in favor of the jurisdictional requirements described by Repre-

In short, there is nothing in the language of Magnuson-Moss to suggest that Congress meant to eliminate the individual notice requirement as interpreted by the Supreme Court in *Eisen*. Nor can such an intent be inferred from those pieces of legislative history indicating some congressional discontent with the individual notice requirement. When Congress has intended to limit *Eisen*, it has done so expressly, as in the Deepwater Port Act of 1974. We therefore hold that the District Court erred in relieving the appellees of their obligation to adhere to *Eisen*'s individual notice requirement with respect to any class *properly certifiable under Rule 23(b)(3)*. It is to this latter issue—*i.e.*, whether *any* class met the standards for certification established by Rule 23(b)(3)—that we now turn. In light of our holding that Rule 23(c)(2) applies to class actions brought under Magnuson-Moss, we need not reach the question whether individual notice is mandated by due process.

C. *The Predominance Inquiry*

As recounted in Part I.B., the District Court conditionally certified three classes, each pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.[61] Two of

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sentative Moss. *See* S. CONF. REP. NO. 1408, 93d Cong., 2d Sess. 27, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7759. In describing this compromise, Representative Moss could only have been referring to the elimination of this barrier to federal court jurisdiction. Read otherwise, his comments would make little sense, for they would suggest that a class action could always be brought in federal court notwithstanding any federal law (*e.g.*, Rule 23) barring such an action.

[61] FED. R. CIV. P. 23(b)(3) provides:

> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> . . .
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over

the certified classes involved implied warranty claims, one concerned written warranties. For each of the three conditionally certified classes, the District Court announced the requisite Rule 23(b)(3) "find[ing] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members." That essential finding, we conclude, is flawed and must be vacated so that the District Court can consider the matter anew.

Concerning the applicable law, the District Court correctly stated that under the terms of Magnuson-Moss,[62] state law governs the existence and basic meaning of implied warranties.[63] That court apparently believed, however, that the federal Act alone, uncomplicated by "any State law variations," covered the class members' "claims for breach of written warranty."[64] On the matter of class-wide proof crucial to all three certifications, the District Court determined that differences in the

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any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

[62] 15 U.S.C. § 2301(7) (1982). This definition provision reads:

> The term "implied warranty" means an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.

[63] *See Walsh*, 106 F.R.D. at 395.

[64] *Id.* at 404.

transmission systems at issue were not so material as to impede a threshold finding that common questions of fact predominated.[65]

We hold, as the District Court appeared to recognize in a later chapter of this case,[66] that, except in the specific instances in which Magnuson-Moss expressly prescribes a regulating rule, the Act calls for the application of state written and implied warranty law, not the creation of additional federal law. The District Court, in this clearer light, should reexamine whether "variations in State law prohibit a finding of predomination for common questions of law." [67] Furthermore, in view of the multiple transmission configurations swept into the certifications,[68] we remand the "class-wide proof" issue for closer inspection by the District Court.

The District Court initially demonstrated full appreciation of the inquiry a court must make to determine whether, as Rule 23(b)(3) requires, "questions of law or fact common to members of the [alleged] class predominate." [69] Thus, the trial judge identified as key to the commonality of law determination in this case "the impact of potentially varying State laws," and as critical

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[65] *Id.* at 394-95.

[66] In a separate opinion refusing to certify a punitive damages class, the District Court stated its understanding that the Act "add[ed] a new layer of federal warranty law to existing state warranty doctrines," but for the most part did not supplant state law. *Walsh v. Ford Motor Co.*, 627 F.Supp. 1519, 1525 (D.D.C. 1986) (quoting Schroeder, *Private Actions under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1, 35 (1978)). *See* note 13 *supra*.

[67] *Walsh*, 106 F.R.D. at 395.

[68] The parties apparently agree that at least 20 transmission configurations are involved; their dispute concerns the materiality of the differences among these configurations. Brief of Appellees at 20.

[69] *See Walsh*, 106 F.R.D. at 392-93.

to the commonality of fact determination "the availability of class-wide proof." [70] Her analysis veered off course, it appears, because she regarded Magnuson-Moss as an Act intended to facilitate nationwide class actions; she therefore thought it necessary to take a "liberal" or "less strict" approach to Rule 23 certifications.[71] We have already held that Rule 23 applies in Magnuson-Moss cases as it does in federal court cases generally. Had the trial judge felt no Act-prompted pressure to certify, she might not have resisted close analysis of state laws governing the existence, scope, and contours of implied warranties. Furthermore, she might not have assumed that federal law alone governed the alleged written warranty claims. Finally, she might not have proceeded so swiftly to the conclusion that differences in the transmission systems at issue "are either not material or can easily be [handled by establishing] subclasses pursuant to Rule 23(c)(4)." [72]

1. *The Commonality of Law Determination*

Magnuson-Moss, appellees urge, federalizes much of the law governing consumer product warranties; thus common questions of law, they assert, necessarily predominate in this case. Appellees' expansive reading of the Act is not anchored to its text, nor is it securely moored to the legislation's history. The Act, we harbor no doubt, has a far more limited mission. Congress sought only to supplement state warranty law by prescribing certain minimum

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[70] *Id.* at 393.

[71] *See id.* at 386-87.

[72] *Id.* at 395. FED. R. CIV. P. 23(c)(4) provides:

> When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

See also FED. R. CIV. P. 23(c)(1) (class action order may be altered or amended before the decision on the merits).

standards for warrantors, and by affording consumers additional avenues for redress.[73]

The Act provides for civil actions by consumers in state courts or, if specified jurisdictional amount requirements are met (each individual claim, at least $25; all claims in suit, at least $50,000), in federal district courts; courts may award prevailing plaintiffs in such actions costs and expenses, including attorneys' fees.[74] The action

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[73] Congress sought particularly to encourage warrantors to avoid litigation by establishing informal mechanisms for the fair and expeditious resolution of consumer disputes. *See* 15 U.S.C. § 2310(a) (1982) (informal dispute settlement procedures).

[74] 15 U.S.C. § 2310(d) (1982). This section provides:

> (d) **Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims**
>
> (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—
>
> (A) in any court of competent jurisdiction in any State or the District of Columbia; or
>
> (B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.
>
> (2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the

Magnuson-Moss authorizes may be instituted for recovery from "a supplier, warrantor, or service contractor" who has failed "to comply with any obligation under this chapter, *or* under a written warranty, implied warranty, or service contract." [75]

Had Congress intended Magnuson-Moss to substitute federal for state law as the dominant regulator of consumer product warranties under the Act, the alternative references just quoted would be anomalous. An "obligation under this chapter" derives, of course, from the federal Act. The further, separate reference to obligations under written and implied warranties strongly suggests that Congress contemplated the coexistence of another source of regulating rules in the actions authorized by section 110(d), a source outside the federal Act, *i.e.*, state law.[76]

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court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection—

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

[75] *Id.* § 2310(d)(1) (emphasis added).

[76] Federal common law should not supply the regulating rules, for the application of state law here is not inconsistent with federal interests. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-42 (1981) (federal common law comes into play when there is a uniquely federal interest in need of protection or when Congress has clearly signalled its intent that the courts develop federal substantive law). *See generally* Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881 (1986).

Tellingly, the $50,000 amount-in-controversy threshold for federal court jurisdiction stated in section 110(d)(3) confines the mine-run of Magnuson-Moss consumer civil actions to state courts.[77] A responsible Congress would not, without offering rhyme or reason, place the laboring oar in developing a corpus of federal consumer product warranty law in the hands of over fifty diverse, nonfederal court systems.[78]

We state further below why we think it beyond genuine dispute that, as to both implied and written warranties, Congress intended the application of state law, except as expressly modified by Magnuson-Moss, in section 110(d) breach of warranty actions.

a. *Implied Warranty.* The Act, in section 101(7) (set out note 62 *supra*), defines "implied warranty" by explicit reference to state law as modified by federal standards detailed in sections 108 and 104(a).[79] There is

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[77] The $50,000 threshold is not easily crossed because the Act itself does not impose liability on warrantors for personal injuries or consequential damages, and many states permit these liabilities to be disclaimed. *See* U.C.C. § 2-715 (1978). *Cf.* S. REP. No. 151, 93d Cong., 1st Sess. 23 (1973); H. REP. No. 1107, 93d Cong., 2d Sess. 42 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7724.

[78] The Act applies to all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, the Canal Zone and American Samoa. *See* 15 U.S.C. § 2301(15) (1982).

[79] These sections, 15 U.S.C. §§ 2304(a) & 2308 (1982), provide:

> **§ 2304. Federal minimum standards for warranties**
>
> **(a) Remedies under written warranty; duration of implied warranty; exclusion or limitation on consequential damages for breach of written or implied warranty; election of refund or replacement**
>
> In order for a warrantor warranting a consumer product by means of a written warranty to meet the Federal minimum standards for warranty—
>
> (1) such warrantor must as a minimum remedy such consumer product within a reasonable time and without charge, in the case of a defect, malfunction, or failure to conform with such written warranty;

(2) notwithstanding section 2308(b) of this title, such warrantor may not impose any limitation on the duration of any implied warranty on the product;

(3) such warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty; and

(4) if the product (or a component part thereof) contains a defect or malfunction after a reasonable number of attempts by the warrantor to remedy defects or malfunctions in such product, such warrantor must permit the consumer to select either a refund for, or replacement without charge of, such product or part (as the case may be). The Commission may by rule specify for purposes of this paragraph, what constitutes a reasonable number of attempts to remedy particular kinds of defects or malfunctions under different circumstances. If the warrantor replaces a component part of a consumer product, such replacement shall include installing the part in the product without charge.

. . . .

§ 2308. Implied Warranties

(a) Restrictions on disclaimers or modifications

No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration

For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations

A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

nothing obscure about the interplay Congress ordered: state law creates the warranty [80] and also governs its dimensions, except as otherwise prescribed with particularity in Magnuson-Moss itself. The Federal prescriptions apply as written; where the Act states no prescription, state law continues in force.[81]

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[80] *See* S. REP. No. 151, 93d Cong., 1st Sess. 21 (1973) ("It is not the intent of the Committee to alter in any way the manner in which implied warranties are created under the Uniform Commercial Code. For instance, an implied warranty of fitness . . . which might be created by an installing supplier is not, in many instances, enforceable by the consumer against the manufacturing supplier. The Committee does not intend to alter currently existing state law on these subjects.).

[81] Appellees insistently urge that, apart from the (uniform) Uniform Commercial Code definition of an implied warranty of merchantability, Brief of Appellees at 38, and possibly privity, "the Act itself provides uniform federal standards for every legal issue that might be subject to state law variations." *Id.* at 40. *See also id.* at 44-45 ("Except for the definition of an implied warranty, uniform federal standards apply whether the action is brought in state or federal court."); *id.* at 51 ("content and scope [of affirmative defenses to breach of implied warranty claim] is a matter of uniform *federal* decisional law"). These are indulgences in wishful thinking. *See* note 86 *infra* and accompanying text.

In support of their contentions as to the nearly total governance of uniform federal law, plaintiffs cite statements of Representative Eckhardt in a 1971 Hearing on a predecessor bill. *Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 92d Cong., 1st Sess. 390-93 (1971). The statements are not crystalline. They include something for each side. Indeed, Ford cites lines from Rep. Eckhardt to the effect that, as in diversity cases, state law looms large in Magnuson-Moss consumer actions for breach of warranty. *Compare* Brief of Appellees at 42-43 *with* Brief of Appellant at 40-41. These murky and inconsistent statements, we are satisfied, are not entitled to heavy weight. *See Castaneda-Gonzalez v. Immigration and Natur. Serv.*, 564 F.2d 417, 424 (D.C. Cir. 1977); *March v. United States,* 506 F.2d 1306, 1314 & nn. 31-32 (D.C. Cir. 1974).

b. *Written Warranty.* The Act, in section 101(6), sets out a self-contained definition of "written warranty"; in contrast to the subsection defining "implied warranty" (section 101(7), set out note 62 *supra*), the written warranty definition does not refer to state law.[82] An argument that Magnuson-Moss federalizes written warranty law therefore has surface plausibility.

One need not search far, however, to comprehend why the Act presents its own definition of written warranty. State law distinguishes "express" warranties from "implied" ones. "Express warranty" is defined in state law; the term encompasses both written and oral undertakings.[83] Congress ultimately decided that oral warranties

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[82] This definition section, 15 U.S.C. § 2301(6) (1982), provides:

> (6) The term "written warranty" means—
>
> (A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or
>
> (B) any undertaking in writing in connection with the state by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking,
>
> which written affirmation, promise, or undertaking becomes part of the basis of the bargaining between a supplier and a buyer for purposes other than resale of such product.

[83] *See* U.C.C. § 2-313 (1972), which states:

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates

need not be covered in the federal legislation unless and until they become "more prevalent." [84] Because the state law term "express warranty" did not suit the limited federal purpose, Congress supplied a definition — one confined to "written warranty" — that did.

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an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

[84] Both the Senate and House, in their pre-enactment (S. 356) versions of the consumer civil action for breach of warranty, had authorized attorneys' fees for successful plaintiffs. The versions differed in one material respect; while the House permitted suits only for written and implied warranties, the Senate permitted suits for express and implied warranties. When the two versions were reconciled, the Senate's coverage of oral warranties was eliminated with this explanation:

> The Senate bill afforded reasonable attorney's fees to a consumer who successfully sued for the breach of an express oral warranty. The House amendment did not provide reasonable attorney's fees in that situation. The conferees adopted the House approach, but stated that they would reexamine the issue if oral express warranties became more prevalent.

S. CONF. REP. No. 1408, 93d Cong., 2d Sess. 26 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7758.

But Congress indicated that, as in the case of implied warranties, state law would guide the determination whether a written warranty had been created. Magnuson-Moss, in section 101(6), defines "written warranty" as "any written affirmation of fact or written promise made in connection with the sale of a consumer product . . . ." The Conference Report to S. 356, the bill that became the Act, explains:

> The conferees intend that, if under State law a warrantor or other person is deemed to have made a written affirmation of fact, promise, or undertaking he would be treated for purposes of [the Act's consumer remedies section, section 110] as having made such affirmation of fact, promise, or undertaking.[85]

Here too, if Congress intended displacement of state law beyond the Act's explicit prescriptions, one would expect to find a clear statement to that effect.[86] Particularly in an area traditionally in the state's domain, such as sales law, the likelihood is that the national legislature, when it intervenes, and does not say otherwise, opts for the little rather than the much. We have no reason to believe Congress departed from that general pattern in this particular instance.

Having determined that state warranty law lies at the base of all warranty claims under Magnuson-Moss, we next state our reasons for instructing the District Court to reconsider the finding that common legal questions predominate in each class certified.

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[85] *Id.* at 26, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS at 7759.

[86] *Cf.* note 81 *supra.* We are mindful that "[i]f judges readily created federal common law whenever they spotted a gap in federal statutory or constitutional directives, those actions would threaten the classic view of federal law as largely interstitial; there would be much less room in which state law could operate, and the importance of state law would diminish accordingly." Field, *supra* note 76, at 931.

c. *The District Court Finding.* The District Court recognized the controlling role of state law on two issues. First, the trial judge looked to the law of the state of purchase to exclude from class certification purchasers from states in which vertical privity between manufacturer and purchaser is necessary to give rise to an implied warranty.[87] Later, the trial judge held that state law determined the availability of punitive damages; on that account, the judge refused to certify a punitive damages class.[88] The District Court declined, however, to inquire further into the existence and character of differences in state warranty laws. Regarding the written warranty claims, the judge apparently believed all relevant law was federal. As to the implied warranty claims, she explained: "To conclude that a court must look to the many States, with their varying judicial interpretations of what constitutes breach of implied warranty, would make it virtually impossible to apply the Act in multi-State class actions for Magnuson-Moss breach of implied warranty claims." [89] While refusing to consider the application of "varying State laws for breach of implied warranty," the trial judge deferred for consideration on another day "the question of which law shall apply." [90]

Appellees see the "which law" matter as academic. They say no variations in state warranty laws relevant

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[87] *Walsh*, 106 F.R.D. at 395. *See* note 10 *supra*.

[88] *See* notes 13 and 66 *supra*.

[89] *Walsh*, 106 F.R.D. at 395.

[90] *Id.* at 396 & n.12. The judge did not say whether she had in mind applying the law of one particular state to all members of the nationwide class. *Cf. Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2980 (1985) (application of Kansas law to all claimants in nationwide class action would be "arbitrary and unfair" absent showing that Kansas had a significant relationship to each class member's claim).

to this case exist.[91] A court cannot accept such an assertion "on faith." Appellees, as class action proponents, must show that it is accurate.[92] We have made no inquiry of our own on this score and, for the current purpose, simply note the general, unstartling statement made in a leading treatise: "The Uniform Commercial Code is not uniform." [93]

The governance of state law does not inevitably mean that "no multi-State class action for breach of implied [or written] warranty under the Act could ever be possible." [94] A considered predomination determination by the District Court, however, must be made.[95] As the Third Circuit observed in *In re Asbestos School Litigation*,[96] to establish commonality of the applicable law, nationwide class action movants must creditably demonstrate, through an "extensive analysis" of state law variances, "that class certification does not present insuperable obstacles." [97] As appellees themselves at one

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[91] Brief of Appellees at 45-51.

[92] *See, e.g., Horton v. Goose Creek Ind. School Dist.*, 677 F.2d 471, 490 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

[93] J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 7 (2d ed. 1980).

[94] *Walsh*, 106 F.R.D. at 395.

[95] *Cf. General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-61 (1982) (court of appeals judgment affirming class action certification reversed where court of first instance did not engage in rigorous analysis).

[96] 789 F.2d 996 (3d Cir. 1986), *aff'g* 104 F.R.D. 422 (E.D. Pa. 1984), *cert. denied*, 55 U.S.L.W. 3274 (U.S. Oct. 21, 1986).

[97] *Id.* at 1010. We set out below more completely the Third Circuit's statement in *Asbestos* upholding the District Court's Rule 23(b)(3) certification:

> To meet the problem of diversity in applicable state law, class plaintiffs have undertaken an extensive analy-

point accurately observed: "The issue can only be resolved by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines." [98]

Citing decisions of sister courts, appellees urge that nationwide class actions may be maintained even when state law variations are marked. The decisions cited, however, invariably involved lawsuits in which "the evidence in each case [on major factual questions] was either identical or virtually so." [99] These cases would be relevant, therefore, only if appellees proffered strong indications that major factual issues in each class member's claim in this lawsuit are "identical or virtually so." We thus reach the commonality of fact issue this case presents.

2. *The Commonality of Fact Determination*

The trial judge expressed concern "whether there are material differences between the four transmissions at issue which would prevent the presentation of class-wide proof." [100] She observed, however, that if material dif-

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sis of the variances in products liability among the jurisdictions. That review separates the law into four categories. Even assuming additional permutations and combinations, plaintiffs have made a creditable showing, which apparently satisfied the district court, that class certification does not present insuperable obstacles.

789 F.2d at 1010.

[98] Brief of Appellees at 45-46.

[99] *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 (5th Cir. 1986); *see also Deadwyler v. Volkswagen of America, Inc.*, No. ST-85-38 (W.D.N.C. Apr. 7, 1986) (implied warranty claims involving common defect in a common product).

[100] *Walsh*, 106 F.R.D. at 394.

ferences became apparent, she could, at a later stage, "separate each transmission type into a subclass." [101] She did not home in on Ford's argument, backed by the affidavits of experts,[102] that the class certifications at issue in fact encompassed at least twenty materially different transmission control systems.[103]

Appellees have not identified in support of the alleged breach of warranty claims, and we have not found in the record, any indications of evidence *common to all the transmission configurations* swept into the class definition. Class action proponents may not be called upon to prove their case in order to obtain certification.[104] However, appellees must tender some creditable basis for claiming that "differences in design among [Ford's approximately 20] systems are minor and immaterial." [105]

On appeal, appellees offered a definite statement regarding fact commonality. Ford's transmission system design variations "tend to cancel each other out," appellees assert, so that "the designs all remain in the same defect class." [106] Standing alone, this assertion is Delphic, but appellees immediately explain: "all of [Ford's] design variations are minor in relation to the overriding common defect of lack of automatic self-centering." [107]

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[101] *Id.; see* note 72 *supra.*

[102] R.E. Tabs 11, 12.

[103] The trial judge thought four subclasses might be manageable, *see Walsh,* 106 F.R.D. at 394; she did not speak to the prospect of twenty subclasses.

[104] *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78 (1974).

[105] *See* Brief of Appellees at 63-64.

[106] *Id.* at 64.

[107] *Id.* The full statement in the brief reads:

> [D]ifferences in design among the systems are minor and immaterial. In fact, the examples given by Ford enable

This defect, appellees maintain, is common to every Ford transmission system at issue. It is the defect, appellees say, that permits cars to "jump into reverse." [108]

Because appellees now assign prime place to the alleged common defect called "lack of automatic self-centering," we inspect that ground for claiming a predominating common question of fact. A transmission suffers from "lack of automatic self-centering," appellees state, if it will not immediately adjust itself into a gear when the driver leaves the control lever in a position between gears. Appellees' expert, Simon Tamny, has sworn that this alleged defect is due primarily to a rounded or flat, rather than sharp, tooth between the reverse and park positions on the transmission "roostercomb." [109] The evidence appears beyond dispute, however, that the roostercombs of numerous other automobiles (including most, if not all, cars of Ford's domestic competitors and many foreign luxury automobiles) were at least as dull as the Ford roostercombs.[110]

> as [sic] to demonstrate this. (Ford Br. at 64-66.) Thus, the relative ratchet and detent spring forces in the C-4 that tend to return the manual valve to reverse rather than holding it in park is counterbalanced by the greater shift effort required to place the C-6 in park, since the C-6 lacks the C-4's additional deficiency. The single rod linkage is more sensitive to engine vibration, but the cable rod is more sensitive to friction. In short, because these design variations tend to cancel each other out, the designs all remain in the same defect class. This is because all of these design variations are minor in relation to the overriding common defect of lack of automatic self-centering.

Id. at 63-64 (footnote omitted).

[108] *Id.* at 4, 9.

[109] R.E. Tabs 16, 20.

[110] R.E. Tabs 12, 25.

Thus, Ford's unsharp roostercombs cannot carry the day for appellees. If Ford transmissions engaged in park-to-reverse more frequently than other automobile transmissions, then something in addition to the roostercomb tooth contour must have brought about the defect. That something else has not been identified as common to all Ford transmission configurations at issue. So far as we can tell from the current record, the unsharp roostercomb theory still leaves the appellees with the need to show that each configuration had special characteristics which, singularly or in combination, caused lack of automatic self-centering. Before reaching a common fact predominance determination under Rule 23(b)(3), the District Court should have inquired further in order to estimate how varied (configuration-specific) the transmission design defect proof would likely be.

III. Conclusion

In finding that individual notice to each potential class member was unnecessary, and that common questions of law or fact predominated, the District Court was swayed by the view, which we have found incorrect, that Congress sought to facilitate nationwide class actions under Magnuson-Moss, and therefore expected an indulgent approach by judges to Rule 23(b)(3) certifications.[111] Having clarified that Rule 23 applies in Magnuson-Moss cases as it does in federal litigation generally, *i.e.*, sen-

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[111] We do not reach appellees' argument that the District Court erred in rejecting their alternatively proposed Rule 23(b)(2) declaratory and equitable (recall/retrofit) relief class. We note, however, that manageability problems that might block a class action under Rule 23(b)(3) may be entailed as well in the Rule 23(b)(2) format. We note, too, that the Department of Transportation, when it declined to continue an investigation against Ford for the very defect alleged by appellees here, determined that injunctive relief similar to that which appellees requested in the District Court was inappropriate. *See Center for Auto Safety, Inc. v. Lewis*, 685 F.2d 656 (D.C. Cir. 1982).

sibly but without special dispensations, we return the case to the District Court with no prejudgment as to the outcome of a renewed predominance inquiry.[112]

For further proceedings consistent herewith, the decision of the District Court certifying classes in this litigation is

Vacated and remanded.

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[112] The District Court recognized that, with respect to the two classes seeking to pursue property damage claims based on specific park-to-reverse incidents, potentially individual issues were present "such as causation, affirmative defenses, and damages." *Walsh*, 106 F.R.D. at 399. Such issues, the trial judge observed and we agree, are not necessarily dispositive against certification. "The Court [can] certify a strictly limited group of issues, establish various subclasses, or address the common issue on a class-wide basis and manage the individual issues . . . at the conclusion of the class-wide trial." *Id. See Joseph v. General Motors Corp.*, 109 F.R.D. 635, 642 (D. Colo. 1986) (certifying a state-wide Magnuson-Moss class because individual questions of causation "can be resolved in separate proceedings").

APPENDIX C

JOHN F. "JACK" WALSH, *et al.*,

Plaintiffs,

v.

FORD MOTOR COMPANY,

Defendant.

Civ. A. No. 81-1998.

United States District Court,
District of Columbia.

May 9, 1985.

Plaintiffs brought suits seeking damages, declaratory and injunctive relief for breach of written and implied warranty, strict tort liability, and negligence because of allegedly defective automatic transmissions in certain types of motor vehicles manufactured by defendant. On plaintiffs' motion for class certification, the District Court, June L. Green, J., held that: (1) plaintiffs were not entitled to certification of class seeking either recall or retrofit or issuance of extended written warranties covering all damages which might result from future "park-to reverse incident" from these transmissions; (2) plaintiffs were entitled to conditional certification of owners seeking difference in value between transmissions as received and those transmissions as warranted; (3) plaintiffs were entitled to certification of group of plaintiffs who sustained property damage due to alleged park-to-reverse incident; (4) plaintiffs were entitled to certification of class of owners seeking recovery under written warranty for damages incurred as result of park-to-reverse incident; (5) plaintiffs were not entitled to certification of class of persons alleging personal injuries resulting from park-to-reverse incidents; and (6) individual notice was not required.

Order accordingly.

Beverly C. Moore, Jr., Law Offices of Beverly C. Moore, Jr., Landon Gerald Dowdey, Law Offices of Landon Gerald Dowdey, Washington, D.C.; Wallace J. Smith and Ben Schiebel, Wallace J. Smith, Inc., Sacramento, Cal.; Barry Schwartz, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pa.; William H. McDonald, David A. Childers, John E. Price and Robert M.N. Palmer, Woolsey, Fisher, Whiteaker, McDonald & Ansley, Springfield, Mo., for plaintiffs.

William T. Coleman, Jr., Richard C. Warmer, Carl R. Schenker, Jr. and John H. Beisner, O'Melveny & Myers, Washington, D.C., for defendant; Henry R. Nolte, Jr., James M. MacNee, Ford Motor Co., Dearborn, Mich., of counsel.

OPINION

JUNE L. GREEN, District Judge.

This matter is before the Court on plaintiffs' motion for class certification, opposition thereto, numerous supplemental memoranda from both parties, and oral argument on the motion. For the reasons set forth below in detail, the Court certifies a number of classes proposed by plaintiffs, but also declines to certify other proposed classes. Attached to this memorandum opinion is an order setting forth those classes which the Court has conditionally certified pursuant to Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") and the class-action provisions of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310 ("Magnuson-Moss" or the "Act").

Plaintiffs brought this action seeking damages, declaratory and injunctive relief for breach of written and implied warranty, strict tort liability, and negligence because of allegedly defective automatic transmissions in certain types of motor vehicles manufactured by defendant, Ford Motor Company ("Ford"). The complaint alleges that defendant's 1976–1979, as well as certain 1980 model motor vehicles with FMX, C-3, C-4, or C-6 automatic trans-

missions, may slip into the reverse position while not being placed there by the driver.[1] The complaint alleges claims for breach of implied and written warranties under the Act, as well as State law claims for breach of express and implied warranty, strict tort liability, and negligence for personal injuries and "other claims" in excess of $10,000.

Plaintiffs seek to certify the following classes:

> CLASS I—*Implied Warranty Incidents*, pursuant to Rule 23(b)(3):
>
> All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of property damages incurred as a result of a Ford park-to-reverse incident, but excluding such persons who purchased such Ford vehicles
>
> (a) in (i) Alabama, Arizona, Connecticut, Illinois, Indiana, New Jersey, New York, Ohio, Washington, or Wisconsin or (ii) second hand in California or Georgia, or
>
> (b) prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.
>
> CLASS II—*Written Warranty Incidents*, pursuant to Rule 23(b)(3):

All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of property

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[1] The parties have described this phenomenon in numerous ways; *e.g.*, "park-to-reverse incidents," "unexpected vehicle movement," and "jump-out-of-park" incidents. The Court, for lack of a better, easily defined term, and for purposes of this opinion, shall use the expression "park-to-reverse" incidents to describe this occurrence.

damages incurred as a result of a Ford park-to-reverse incident occurring within the 12,000 mile/12 month written warranty period about which they complained to Ford or a Ford dealer within a reasonable time thereafter, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977, and did not experience a park-to-reverse incident prior to November 2, 1977.

CLASS III—*All Owners Difference in Value Damages,* pursuant to Rule 23(b)(3):

All owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of damages equal to the difference in value between those transmissions as received and those transmissions as warranted, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977, and including the following subclasses of such Ford owners who actually experienced a Ford park-to-reverse incident:

(a) all persons described in Class I without limitation as to whether the incident resulted in property damage, and

(b) all persons described in Class II without limitation as to whether the incident resulted in property damage.

CLASS IV—*All Owners Recall/Retrofit Equitable Relief,* pursuant to Rule 23(b)(2) [sic]:

All owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking the equitable relief of (i) recall and retrofit of those transmissions to remedy design defects or (ii) the issuance of extended written warranties covering all dam-

age (other than for personal injuries) resulting from future park-to-reverse incidents, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977, and including the following subclasses of such Ford owners who actually experienced a Ford park-to-reverse incident:

(a) all persons described in Class I without limitation as to whether the incident resulted in property damage, and

(b) all persons described in Class II without limitation as to whether the incident resulted in property damage.

CLASS V—*Personal Injury Incidents—Declaratory Judgment on Common Liability Issues,* pursuant to Rule 23(b)(3):

All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission, including family or household members entitled to enforce Ford's written or implied warranties pursuant to UCC § 2-318, who were seriously injured in person (*i.e.*, who claim personal injury, property, and/or punitive damages exceeding $10,000) as a result of such Ford vehicle's park-to-reverse incident, certification of this class to be limited to the common liability issues to be litigated with respect to Classes I and II, and including the following subclasses of such persons:

(a) all persons described in Class II without limitation as to whether the incident resulted in property damage, the date of the vehicle's purchase, or the date of the incident,

(b) all persons described in Class I without limitation as to whether the incident resulted in property damage, the date of the vehicle's purchase, or the date

of the incident, but including such Ford vehicles purchased in Connecticut, Ohio, Indiana, or Washington, and

(c) all persons injured by such incidents in the states of Alabama, Arizona, Illinois, New Jersey, New York, or Wisconsin, which persons assert strict product liability claims.

CLASS VI—*Punitive Damage Incidents:*

All members of Classes I, II or V and including the following subclasses of such persons:

(a) pursuant to Rule 23(b)(3), all such persons claiming punitive damages directly under the Magnuson-Moss Act, and

(b) pursuant to Rule 23(b)(1)(B), all such persons, except those whose injuries occurred or whose Ford vehicles were purchased in Washington, Louisiana, Massachusetts, Connecticut, and Michigan, claiming punitive damages under state law, with further subclasses defined as necessary according to

(i) whether the person asserts a warranty, strict products liability or negligence claim, and

(ii) whether the applicable state standard for an award of punitive damages is gross negligence or willful misconduct.

Plaintiffs' Proposed Class Certification Order, June 13, 1984. Plaintiffs' proposed Class III and Class IV are pursued in the alternative. Further, plaintiffs state that if the Court were not inclined to certify the "all owners" categories in proposed Class III or Class IV, these classes could be limited to only those plaintiffs who experienced park-to-reverse incidents. Plaintiffs' Memorandum on Class Certification Order at 30 n. 20.

In order to address adequately plaintiffs' class certification motion, the Court first must review some of the history of this litigation.

BACKGROUND OF THIS LITIGATION[2]

On March 14, 1984, this Court denied Ford's motion to dismiss the second amended complaint. *See Walsh v. Ford Motor Co.*, 588 F.Supp. 1513 (D.D.C. 1984). In the memorandum opinion accompanying that decision, the Court examined closely the question of whether plaintiffs had satisfied the strict jurisdictional requirements of the Act.[3] Specifically, the Court examined each and every named plaintiff to determine whether that plaintiff was able to state a claim for relief and, therefore, could be counted toward satisfying the 100-named plaintiff requirement which is necessary in order to bring a class action under Magnuson-Moss. *See* 15 U.S.C. § 2310(d)(3)(C).

Despite plaintiffs' protestations, the Court, in counting plaintiffs, refused to recognize claims of joint owners or duplicative and triplicative plaintiffs to satisfy the 100-named plaintiff jurisdictional requirement of the Act. *Walsh*

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[2] For a more complete history of this litigation see the Court's opinion in *Walsh v. Ford Motor Co.*, 588 F.Supp. 1513 (D.D.C. 1984).

[3] The Act requires the following jurisdictional prerequisites to be met before a case may be brought in Federal court:

> No claim shall be cognizable in a suit brought [in an appropriate district court of the United States] . . .
>
> (A) if the amount in controversy of any individual claim is less than the sum or value of $25;
>
> (B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests or costs) computed on the basis of all claims to be determined in this suit; or
>
> (C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

15 U.S.C. § 2310(d)(3).

v. Ford Motor Co., 588 F.Supp. at 1521. The Court also examined whether these named plaintiffs sufficiently alleged fraud and due diligence in order to toll the statute of limitations. *Id.* at 1521-24. It further looked to the law of thirteen states to examine whether those states required the presence of vertical privity to pursue claims for breach of implied warranty. *Id.* at 1524-35. Finally, the Court limited written warranty claims to those named plaintiffs who alleged transmission malfunctions within the warranty period.[4] *Id.* at 1535-36. After making determinations on these issues, the Court concluded that of the 210 plaintiffs originally named in the second amended complaint, only 106-named plaintiffs remained to satisfy the Act's jurisdictional requirement.[5] *Id.* at 1536.

Throughout the briefing on defendant's motion to dismiss the second amended complaint, plaintiffs insisted that the Act does not require the scrutiny the Court deemed necessary. The Court reasoned that a close "merits" evaluation was required by the Act before a court could determine whether it had jurisdiction. *See Walsh v. Ford Motor Co.*, 588 F.Supp. at 1519-21.

This conclusion is supported by the language of the Act, as well as its legislative history. As noted by this Court, "where 'the jurisdiction of Federal courts . . . has been

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[4] During the course of briefing for this present motion plaintiffs noted that Judge Jackson in *Alberti v. General Motors Corp.*, 600 F.Supp. 1026 (D.D.C. 1985), a Magnuson-Moss class action, upheld written warranty claims under the "latent defect" theory. This Court, in its opinion of March 14, 1984, rejected this theory. *See Walsh v. Ford Motor Co.*, 588 F.Supp. at 1535-36. Given Judge Jackson's reasoning in *Alberti*, the Court is prepared to reconsider its conclusions as to the written warranty limitations, but will defer a decision on this issue until a proper motion and briefing are presented.

[5] On April 13, 1984, the Court amended its opinion of March 14, 1984, and dismissed the Magnuson-Moss claims of four additional plaintiffs, thereby reducing the total number of named plaintiffs to 102. *See Walsh v. Ford Motor Co.*, 592 F.Supp. 1359 (1984).

narrowed by . . . acts of Congress . . . the statute calls for its strict construction.' " *Id.* at 1520 (quoting *Healy v. Ratta,* 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248 (1934)). Congress evinced an intent to narrow strictly a Federal court's jurisdiction in order "to avoid trivial or insignificant actions being brought as class actions in the federal courts." H.R.Rep. No. 93-1107, 93d Cong., 2d Sess. ("House Committee Report"), *reprinted in* 1974 U.S. Code Cong. & Ad.News 7702, 7724; *see also Consumer Warranty Protection—1973; Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 1st Sess. at 63 (Comm.Print 1973) (comment by Rep. Broyhill stating concern with overburdening the Federal court system).

It is plain, however, that once jurisdiction has attached in Federal court, the Act must be interpreted reasonably in order to ensure that its purposes are implemented. As the House Committee noted, once "the conditions of th[e] [jurisdictional] section are met by a class of consumers damaged by a failure to comply with a warranty . . . Section 110(d) [15 U.S.C. § 2310(d)] should be construed reasonably to authorize the maintenance of a class action." House Committee Report, *reprinted in* 1974 U.S.Code Cong. & Ad. News at 7724. This apparent liberal application of class-action requirements under the Act in contrast to its strict jurisdictional requirements, creates a balance between the intent of Congress to provide a Federal forum whereby plaintiffs can pursue nationwide class actions against companies which violate the Act or breach warranties and Congress' concern about overburdening Federal courts with trivial, insignificant actions.

This Court has construed strictly the jurisdictional prerequisite of Magnuson-Moss as outlined in section 110(d). *See Walsh v. Ford Motor Co.,* 588 F.Supp. 1513. It must now address the issue of class certification, keeping in mind that the private enforcement and class action pro-

visions of the Act are "remedial in nature and . . . designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers." House Committee Report, *reprinted in* 1974 U.S. Code Cong. & Ad.News at 7724.

APPLICABILITY OF RULE 23 TO MAGNUSON-MOSS

In determining whether a class may be certified, Federal courts must follow Rule 23 of the Federal Rules of Civil Procedure. It is applicable in all actions, absent a "direct expression" by the Congress to the contrary. *Califano v. Yamasaki*, 442 U.S. 682, 700, 99 S.Ct. 2545, 2557, 61 L.Ed.2d 176 (1979). Although the Supreme Court in *Yamasaki* does not state where it may find a "direct expression" of intent to modify the applicability of the Federal rules, the Supreme Court's opinion in *Trbovich v. United Mine Workers*, 404 U.S. 528, 532-36, 92 S.Ct. 630, 633-35, 30 L.Ed.2d 686 (1972), suggests that this direct expression may be found in the legislative history of the Act.

Some commentators have argued that Rule 23 may not apply at all to Magnuson-Moss. *See* Comment, *The Magnuson-Moss Class Action Provisions: Consumers' Remedy or an Empty Promise*, 70 Geo. L.J. 1399, 1409-10 (1982) ("Comment, *Magnuson-Moss Class Action Provisions*"); Reitz, Curtis R., *Consumer Protection Under the Magnuson-Moss Warranty Act* at 99-100 (1978) ("*Reitz*"). They reason that because section 110 of the Act only makes reference to that portion of Rule 23 addressing the representative capacity of named plaintiffs, the remaining portions of the Rule do not apply to Magnuson-Moss. As one commentator noted:

> If the statute made no mention of rule 23 it would appear that Congress had intended that the usual rule 23 standards govern Magnuson-Moss Act class actions. Yet by expressly indicating that rule 23 applies in a specific circumstance, Congress implied that *in*

> *general* rule 23 should not apply to to Magnuson-Moss Act suits. Such an interpretation regarding rule 23 as inapplicable, except in provisions in which it is explicitly incorporated, would not render superfluous the two specific references to rule 23. Further, such an interpretation would preserve Congress' apparent intent . . . to give consumers an opportunity to bring a type of class action not already available to them in typical rule 23 class actions.

Comment, *Magnuson-Moss Class Action Provisions*, 70 Geo.L.J. at 1409 (footnotes omitted) (emphasis in original). *See also Reitz* at 100 ("This inference [of the Rule's inapplicability except where specifically referred to] is buttressed by the Act's requirement of at least 100 named plaintiffs with claims representing a minimum of $2,500 [sic][6] out of a total of $50,000 or more. Such specific conditions displace the more general prerequisites of Rule 23(a), which indicate how numerous a class must be and what proportion may represent the whole.") *But see In Re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1135 n.50 (7th Cir.), *cert. denied*, 444 U.S. 870, 100 S.Ct. 146, 62 L.Ed.2d 95 (1979) ("The explicit mention of the applicability of Rule 23 bolsters our conclusion that [the] Rule . . . is applicable to class actions maintained under the Act.").

The Court will not read section 110 so broadly as to have it supersede the Rule 23 class action provision. It will, instead, apply Rule 23 where it is consistent with the terms and intent of Magnuson-Moss. *Cf. Weems v. McCloud*, 619 F.2d 1081, 1094 (5th Cir. 1980) ("the Federal Rules of Civil Procedure are frequently applied less strictly in special statutory proceedings, where strict application of the rules would frustrate the statutory purpose"); *Usery*

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[6] Title 15, United States Code, section 2310(d)(3) requires that each individual's claim must be equal to or exceed the amount of $25, not $2,500, if the action is to be brought in Federal court.

v. District No. 22, United Mine Workers of America, 567 F.2d 972, 975 (10th Cir. 1978) (to permit intervention pursuant to Rule 24(a) of the Federal Rules of Civil Procedure in a suit brought by the Secretary of Labor under Title IV of the Labor Management Reporting Act of 1959, 29 U.S.C. § 482(b), would be "out of harmony with the fundamental purposes . . . of the Act"); *Wright v. Stone Container Corp.,* 524 F.2d 1058, 1061-62 (8th Cir. 1975) ("Rule 23 should be liberally construed to effectuate the remedial policy of Title VII").

CLASS CERTIFICATION IN GENERAL

When determining whether it should grant certification to a class of plaintiffs, a court must not delve into the merits of the action. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177-78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974); *Blackie v. Barrack,* 524 F.2d 891, 901 (9th Cir. 1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976). A court is obliged to determine only whether the requirements of Rule 23 have been satisfied. *See Chestnut Fleet Rentals, Inc. v. Hertz Corp.,* 72 F.R.D. 541, 543 (E.D.Pa. 1976) ("[T]he central issue raised in a motion for certification is whether a class action is appropriate, not the probability of plaintiffs' success on the merits of the substantive claim.") (citing *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732); *Kahan v. Rosenstiel,* 424 F.2d 161, 169 (3d Cir.), *cert. denied,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970).

The question of whether a class may be certified is left to the discretion of the district court. *See, e.g., Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100, 101 S.Ct. 2193, 2200, 68 L.Ed.2d 693 (1981). Further, Rule 23 determinations are made in a nonadversarial context. *McCarthy v. Kleindienst,* 741 F.2d 1406, 1421 (D.C.Cir.1984) (Mikva, J., concurring in part and dissenting in part). A court must determine, pursuant to the provisions of Rule 23, whether plaintiffs' cause of action is suitable for resolution on a

classwide basis. *Id.* at 1412 n.6; *see also Coopers & Lybrand v. Livesay,* 437 U.S. 463, 469 n.12, 98 S.Ct. 2454, 2458 n.12, 57 L.Ed.2d 351 (1978).

In making the certification determination in this case the Court also must be mindful that any certification determination is conditional and may be altered, expanded, subdivided, or vacated as the case begins to progress toward an actual merits determination. *See* Fed.R.Civ.P. 23(c)(1), 23(c)(4)(B).[7] The Court must also examine issues of class certification against the backdrop of Magnuson-Moss and Congress' intent to provide class actions as a form of recovery to consumers for breach of written and implied warranty.

As noted *supra,* plaintiffs seek to certify numerous classes in this action against Ford. Because plaintiffs have characterized their implied warranty claims as the "core" class in this action and because most of the issues raised in the class certification motion can be adequately addressed in the context of Magnuson-Moss claims for breach of implied warranty, the Court first will address extensively the certification questions in the implied warranty context. After addressing the implied warranty class certification questions, the Court then will address the remaining classes which plaintiffs seek to have certified and examine any additional stumbling blocks that might prevent certification of those groups. Finally, the Court will address the question of notice, including the kind of notice required for the classes which have been certified. For the sake of clarity the Court will restate what plaintiffs seek to have certified, as it addresses the various proposed classes.

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[7] Rule 23(c)(1) of the Federal Rules of Civil Procedure provides in pertinent part: "An order [granting class certification] may be conditional, and may be altered or amended before the decision on the merits." Rule 23(c)(4)(B) provides in pertinent part: "a class may be divided into subclasses and each subclass treated as a class. . . ."

PLAINTIFFS' IMPLIED WARRANTY CLASS

Plaintiffs seek to certify the following class for breach of implied warranty under Magnuson-Moss:

> *Implied Warranty Incidents,* pursuant to Rule 23(b)(3):
>
> All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of property damages incurred as a result of a Ford park-to-reverse incident, but excluding such persons who purchased such Ford vehicles
>
> (a) in (i) Alabama, Arizona, Connecticut, Illinois, Indiana, New Jersey, New York, Ohio, Washington, or Wisconsin or (ii) second hand in California or Georgia, or
>
> (b) prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.

Plaintiffs' Proposed Class Certification Order, June 13, 1984. Within this implied warranty group plaintiffs also seek to certify the following classes alternatively:

> *All Owners Difference in Value Damages,* pursuant to Rule 23(b)(3):
>
> All owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of damages equal to the difference in value between those transmissions as received and those transmissions as warranted, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977, and including the following subclasses

of such Ford owners who actually experienced a Ford park-to-reverse incident:

> (a) all persons described in [the implied warranty incidents group] without limitation as to whether the incident resulted in property damage. . . .

or

> *All Owners Recall/Retrofit Equitable Relief,* pursuant to Rule 23(b)(2) [sic]:
>
> All owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking the equitable relief of (i) recall and retrofit of those transmissions to remedy design defects or (ii) the issuance of extended written warranties covering all damage (other than for personal injuries) resulting from future park-to-reverse incidents, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977, and including the following subclasses of such Ford owners who actually experienced a Ford park-to-reverse incident:
>
> (a) all persons described in [the implied warranty incidents group] without limitation as to whether the incident resulted in property damage. . . .

Id.

I. The Prerequisites of Rule 23(a)

In order to bring a class action plaintiffs must satisfy the prerequisites that are set forth in part "a" of Rule 23. Failure to satisfy any of the mandatory requirements set forth in this section is fatal to class certification. *See General Telephone Co. of Southwest v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); *Wetzel v. Liberty Mutual Insurance Co.,* 508 F.2d 239, 246

(3d Cir.), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975). Rule 23(a) provides:

> *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). The Court will address each factor to determine whether it has been satisfied.

A. Numerosity

Under Rule 23(a)(1) the class must be so numerous that joinder would be impracticable. Here, plaintiffs have stated that "the entire class consists of owners of several million vehicles, and the number of persons having failures class claims for actual damages is at least in the thousands for each transmission type." Plaintiffs' Motion for Class Certification at 12. Because Magnuson-Moss requires the assemblage of at least 100-named plaintiffs, 15 U.S.C. § 2310(a)(3)(C), the numerosity requirement would be satisfied if the Court found it has jurisdiction over a class action pursuant to the terms of the Act.

Defendant argues that because the "all-owners" group is so large, the Court should not grant certification. Under Rule 23(a)(1), however, a court only looks to see if a putative class is so numerous that joinder would be inappropriate. Defendant's argument as to the extremely large size of the class should be and will be addressed in the discussion of manageability issues that are raised in (b)(3) class actions. *See* Fed.R.Civ.P. 23(b)(3)(D); *infra* at 396-398. The Court finds that plaintiffs have satisfied the numerosity requirement set forth in Rule 23(a).

B. Common Questions of Law or Fact

Neither plaintiffs nor defendant addresses the requirements of this prerequisite to maintaining a class. But "a few courts in actions brought under subdivision (b)(3) have not drawn a distinction between [the subdivision (a)(2) requirement and that of the requirement set forth in subdivision (b)(3)]." *See* C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1763 at 610 (1972) ("Wright & Miller"). This is so because courts either have "dealt with the common-issue question simultaneously with their inquiry into whether common questions predominate or have assumed that Rule 23(a)(2) was satisfied and thought it necessary only to rule on the question whether the suit fit within subdivision (b)(3)." *Id.* (footnote omitted).

Regardless of the parties' failure to address this issue, it is plain that common issues of law or fact are present. These common issues arise from the allegations of design defects in certain Ford transmissions which allegedly produce extremely high rates of "park-to-reverse incidents," Ford's alleged knowledge of the defects, and its alleged breach of implied warranty of merchantability. Because subdivision (b)(3) requires that questions of law or fact common to the members of the class predominate, the Court will address again in detail the issue of commonality when it discusses subdivision (b)(3) actions under the implied warranty class.

C. Typicality of Class Representatives' Claims and Defenses with the Entire Class—Protected Interests of the Class

In their original motion for class certification filed before this Court's decision on defendant's motion to dismiss the second amended complaint, plaintiffs listed four class representatives, each owning one of the four transmission types alleged to be defective. In the briefing which transpired subsequent to the decision on the motion to dismiss the second amended complaint, plaintiffs have not stated

which class representatives they wish to have pursue this action. There are, however, at least 102 individuals who could become class representatives for the implied warranty incidents class. As the court noted in *In Re "Agent Orange" Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y.1980), "[a]lthough the named plaintiffs for purposes of the class action are yet to be designated, the court is satisfied that out of the extremely large pool available[,] representative plaintiffs can be named who will present claims typical of those of the class." *Id.* at 787. The Court takes the same position here. Out of all the potential class members for breach of implied warranty "incidents" class, plaintiffs surely will be able to provide class representatives that either represent the whole class or any subclass that may be required in the future.

The representative plaintiffs named should be able to protect the interests of absent class members. This is so because plaintiffs plan to establish their claims through the use of class-wide proof. Plaintiffs have further proposed to name a class representative for each type of transmission at issue. The claims of these class representatives would not be antagonistic to the claims of the entire class.

Defendant argues, however, that none of the named plaintiffs listed in the complaint can represent adequately the members of the "all-owners" implied warranty group who did not endure an alleged "park-to-reverse incident" but only come to the Court seeking relief for the "difference in value" between those transmissions that they received and those that they would have received if the transmissions had been warranted.

The Court agrees that the "incidents" implied warranty class representatives may have interests that are different from those of the nonincident "all-owners" group.[8] It also

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[8] It is evident, however, that any proof of extraordinarily high Ford

notes that plaintiffs have failed to list any nonincidents "all-owner" class representatives who just seek relief for either the "difference in value" or "recall/retrofit." Again, the Court believes that failure to provide a court with proposed class representatives will not be fatal to the certification issue. *See id.* The Court expects that plaintiffs will be able to provide to this action, representatives for the nonincident "all-owners" group. Failure to provide such representatives may require this Court to reconsider certification of that group.

Defendant also argues that the claims and defenses of any possible class representative would not be typical of the claims and defenses of any class which the Court might certify. Specifically, they argue that because there are four different kinds of transmissions at issue here and there are issues of causation, state law variations, and affirmative defenses, a court could never find that the claims of a class representative are typical to that of the entire class.

The Court will address these issues in the (b)(3) subdivision of its class certification analysis. *See infra* at 393-403. It notes, however, that at this stage of the litigation, the Court is concerned with identifying only those issues which are common to the entire class. The individual issues are not part of the certification process. Further, the Court can establish certain subclasses to resolve any problems that might arise through alleged state law or product variations. *See* Fed.R.Civ.P. 23(c)(4)(B).

D. Adequacy of Representation

The two criteria for determining the adequacy of representation are that plaintiffs' counsel be "qualified, experienced, and generally capable to conduct the proposed

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"park-to-reverse" frequencies and mechanical system defects that must be established for the "incidents" group in order to recover for property damage is the same proof that would be necessary for the "all-owners" group to recover "difference-in-value" damages.

litigation and . . . [that] the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d at 247; *accord Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978); *National Association of Regional Medical Programs, Inc. v. Mathews*, 551 F.2d 340, 345 (D.C.Cir.1976), *cert denied*, 431 U.S. 954, 97 S.Ct. 2674, 53 L.Ed.2d 270 (1977). In the previous section of this opinion, the Court addressed the potential for conflicting interest between class representatives and the entire class and did not find it to be so onerous as to prevent certification. It must now examine the adequacy of representation of plaintiffs' counsel and whether counsel is capable of effectively prosecuting this action.

Despite defendant's arguments and this Court's earlier misgivings, plaintiffs' counsel has, to date, effectively managed and advocated what can only be described as an extremely complex class action. Further, counsel has effectively managed the varying interests that have arisen among various putative classes in this case. Finally, plaintiffs' counsel has represented other Magnuson-Moss class actions and is reasonably familiar with the process. The Court expects that counsel for plaintiffs, as well as defendant, will continue to aid this Court in managing this action. It further expects that counsel for the parties will work to overcome any prior difficulties that may hve emerged during the preliminary stages of this action.

Upon reviewing the preliminary requirements of Rule 23(a), the Court is satisfied that the four prerequisites of numerosity, commonality, typicality, and adequacy of representation have been satisfied. The Court must note that for it to address every conceivable argument and every defense raised during this class certification process would be prohibitive. The Court has, however, examined all of these arguments and has found that plaintiffs have satisfied the necessary prerequisites of Rule 23.

II. The Requirements of Rule 23(b)

The Court now must examine whether plaintiff can satisfy the requirements of subdivision "b." Plaintiffs seek relief for breach of implied warranty pursuant to both subdivisions (b)(2) and (b)(3) of Rule 23.

A. Rule 23(b)(2)

Under subdivision (b)(2) of Rule 23, plaintiffs seek either recall and retrofit of the FMX, C-3, C-4, and C-6 automatic transmission or the issuance of extended written warranties covering all damage which might result from a future "park-to-reverse incident" from these transmissions.

Subpart (b)(2) provides that a class may be certified under this subdivision where "[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ." Fed.R.Civ.P. 23(b)(2). The Advisory Committee Note states that:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate. . . . The subdivision does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.

Fed.R.Civ.P. 23 Advisory Committee Note. As the court noted in *Robertson v. National Basketball Association*, 389 F.Supp. 867 (S.D.N.Y.1975), "[c]lass actions are generally not maintainable under this provision when money damages comprise a significant, if not enormous portion of the total relief requested." *Id.* at 900 (footnote omitted); *see also* Newberg, Herbert B., *Class Actions* § 1145a at 242 (1977) (under a (b)(2) action injunctive and declaratory re-

lief must be the predominant remedy requested from the class members). When equitable relief is the fall-back position and not the principal purpose of the action, Rule 23(b)(2) is generally not available. *See Krehl v. Baskin Robbins Ice Cream Co.*, 78 F.R.D. 108, 117 (C.D.Cal.1978).

In reviewing plaintiffs' overall claims, it is clear that what plaintiffs principally seek here are damages for breach of implied warranty. Further, the Court notes that where damages would be an adequate form of compensation for the injury of an alleged breach of implied warranty, equitable relief, such as recall or retrofit, would not normally lie. *See Restatement 2d, Contracts 2d* § 359(1) (1981). ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.") Therefore, the Court will decline at this juncture to certify a class under subdivision (b)(2).

B. Rule 23(b)(3)

Under subdivision (b)(3) plaintiffs seek damages for breach of implied warranty for individuals who owned Ford cars with FMX, C-3, C-4, or C-6 transmission, experienced a "park-to-reverse incident" with their transmission and incurred some property damage, as well as all owners who owned one of the above-described vehicles but did not necessarily experience an "incident." This group would be limited to those plaintiffs who purchased vehicles in States that do not require the presence of vertical privity to bring a claim for breach of implied warranty.[9]

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[9] In its decision of March 14, 1984, the Court found that State privity requirements for claims of breach of implied warranty under the Act must be examined. *See Walsh v. Ford Motor Co.*, 588 F.Supp. at 1525-26. The Court specifically examined the privity requirements of 13 States where plaintiffs purchased their vehicles, out of a total of 38 States listed in the complaint. Of these 13 States, 11 of them require some form of vertical privity between the owner and manufacturer. The remaining 25 States listed in the complaint were not contested by Ford and, therefore, are presumed not to require vertical privity.

In order to maintain a class action under subdivision (b)(3),

> [T]he court [must find] that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ.P.23(b)(3).

1. Predomination in General

Before addressing both the "all-owners difference-in-value-damages" group and the "incidents" group pursuing claims for breach of implied warranty, the Court must attempt to clarify the meaning of the predomination requirement as set forth in subdivision (b)(3). Although numerous courts have applied varying definitions to this requirement, the Court is satisfied with the standard that there must exist a "common nucleus of operative facts or law." *Payton v. Abbott Labs,* 83 F.R.D. 382, 391 (D.Mass.1979), *vacated on other grounds,* 100 F.R.D. 336 (1983); *see also Esplin v. Hirschi,* 402 F.2d 94, 99 (10th Cir.1968), *cert. denied,* 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969); *Siegel v. Chicken Delight, Inc.,* 271 F.Supp. 722, 726 (N.D.Cal.1967). Although common questions of law or fact must predominate, these questions need not be dispositive of the entire case. Professors Wright and Miller state that "when common questions

represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than on an individual basis." Wright & Miller § 1778 at 53.

When examining the predominance requirement, it is important to remember that this inquiry is not meant to measure the compatability of class action procedures with substantive law, Note, *Developments in the Law—Class Actions,* 89 Harv.L.Rev. 1318, 1505 (1976), but to determine whether "economies can be achieved by means of the class-action device[,]" Fed.R.Civ.P. 23 Advisory Committee Note. Further, courts have the power and discretion to limit the class to particular issues in the case or to divide a class into various subclasses or otherwise bifurcate non-common from common issues in the case. Fed.R.Civ.P. 23(c)(4). Finally, the Court, if necessary, may amend, alter, or vacate a certification order if it finds that the predomination requirement is no longer satisfied. Fed.R.Civ.P.23(c)(1). What is plain here is that Rule 23 "calls upon the judges to judge—to weigh the particular circumstances of particular cases and decide concretely what will work, and how to work, in the individual situations as they appear." Frankel, Marvin E., *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 40 (1968).

In determining whether common questions of law or fact predominate the Court must look, *inter alia,* to questions of manageability and to individual interests or concerns of the various potential class members. Here, these questions naturally involve issues such as the availability of class-wide proof in establishing a cause of action for breach of implied warranty, establishing the level of damages, handling the process of individualized affirmative defenses, the impact of potentially varying State laws on an action for breach of implied warranty, and the problem of alleged material design differences in the four transmission types

at issue. Although it would be premature to resolve all of these issues at this juncture because they neither have been briefed adequately by the parties nor are ripe for resolution, the Court demonstrates below that none of these issues necessarily prevent certification, particularly at this stage of the litigation.

2. "Difference-in-Value" Claims of All Owners for Breach of Implied Warranty

Plaintiffs propose a class or subclass of "all owners" of the relevant transmission types regardless of whether they endured a "park-to-reverse incident." Plaintiffs seek the difference in value between the transmissions as received and those transmissions as warranted. This class, because of statute of limitations reasons, does not include those owners who purchased their vehicles before August 21, 1977, and who did not experience a park-to-reverse transmission incident prior to November 2, 1977. The class is further limited to those individuals who purchased their cars in States which do not require the existence of vertical privity between the seller and buyer. Plaintiffs assert that the common issues which predominate over this class include: whether the subject transmissions were defective in that they were subject to an unacceptably high rate of "park-to-reverse" incidents and if these transmissions were defective, what would be the difference in value between transmissions or vehicles warranted and those which Ford sold. Defendant opposes certification of the "all-owners" class.

a. Existence of Class-wide Proof

Defendant, in challenging the certification of an "all-owners difference-in-value" class, argues that plaintiffs have failed to demonstrate that class-wide proof is available to substantiate their allegations for breach of implied warranty.

Plaintiffs state that they intend to rely on at least three forms of proof to substantiate their claims. They include:

statistical analysis from the Second National Highway Traffic Safety Administration ("NHTSA") Hotline Survey to demonstrate extraordinary high rates of "park-to-reverse" transmission incidents; statistical analysis of "park-to-reverse" complaints on vehicles produced before and after the 1980 design changes; and testimony from plaintiffs' experts explaining the common design defects in the four transmissions at issue and the reasons why the "park-to-reverse" incidents occur. Plaintiffs state that if the Court, at some date in the future, finds the Second NHTSA Hotline Survey statistically inaccurate and therefore inadmissible at trial, they are prepared to engage and retain an independent survey firm to conduct a survey which would be admissible in court.

Defendant finds fault with each form of evidence which plaintiffs plan to offer. Ford argues that the Second NHTSA Survey is statistically inaccurate and therefore inadmissible at trial; that proof of design changes are barred by Rule 407 of the *Federal Rules of Evidence;* [10] that there are significant material differences between the four transmissions at issue; and, finally that "mere" assurances from plaintiffs that they can conduct a new survey that would be admissible in court is not enough to overcome Ford's evidentiary challenges.

Although this Court is obliged to examine the modes of proof offered by plaintiffs, it is not, at this stage, required to determine whether a specific form of proof planned to

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[10] Rule 407 of the *Federal Rules of Evidence* provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

be offered at trial passes evidentiary muster. To make such a determination at this stage would compel the Court to decide an issue that is neither ripe for resolution nor necessary to resolve class certification issues or move this case forward to trial. The Court has, however, closely examined defendant's challenge to plaintiffs' offered proof. For purpose of class certification, the Court concludes that plaintiffs have presented viable means of proving their claims of defect.

The only issue that concerns the Court when examining the existence of class-wide proof is whether there are material differences between the four transmissions at issue which would prevent the presentation of class-wide proof. The affidavits submitted by experts from both parties insist strenuously that there are or are not material differences between these transmissions. Further, the exhibits provided by the parties stress equally the correctiveness of their respective positions. Despite the immense volume of the material on this question, the Court will not determine, at this stage, whether or not these four transmissions are sufficiently and materially similar so as to permit them to be included in a single class. The Court, however, is prepared to separate each transmission type into a subclass if it concludes at a later stage that such a division is necessary. *See* Fed.R.Civ.P. 23(c)(4), (c)(1).

Ford further argues, however, that not only are there four distinct transmissions at issue in this case, but also that these transmissions are used in connection with five different column designs, three different types of linkage systems, and numerous different kinds of Ford vehicles.

The Court is not convinced that these differences are material enough to prevent class-wide proof of breach of warranty. For purposes of class certification, plaintiffs have credibly alleged common defects, certainly at least as to each type of transmission at issue. As the court noted in *Shelter Realty Corp. v. Allied Maintenance Corp.*, 75 F.R.D.

34 (S.D.N.Y.1977), when it certified an antitrust case despite alleged product differences and the lack of a single conspiracy:

> [T]he courts have found it appropriate to look past surface distinctions among the products purchased by class members or the marketing mechanisms involved when allegations of anti-competitive behavior embracing all of the various products and distribution patterns have been credibly pleaded.. . . Identical products, uniform prices, and unitary distribution patterns are not indispensible for class certification in this context.

Id. at 37. *See also Landesman v. General Motors Corp.*, 42 Ill.App.3d 363, 1 Ill.Dec. 105, 107, 356 N.E.2d 105, 107 (1976), *vacated on other grounds*, 72 Ill.2d 44, 18 Ill.Dec. 328, 377 N.E.2d 813 (1978); *Anthony v. General Motors Corp.*, 33 Cal.App.3d 699, 109 Cal.Rptr. 254, 257 (1973). This Court must also look beyond the surface distinctions and examine only those *material* differences that may potentially prevent a finding of predominance of common questions of law or fact. Whatever differences exist, the Court is convinced, at this stage, that these differences are either not material or can easily be subdivided into various subclasses pursuant to Rule 23(c)(4). Alleged product variations do not prevent this Court from finding "predominance."

b. State Law Variations

In opposing class certification for breach of implied warranty, defendant argues that the variations in State law prohibit a finding of predomination for common questions of law. The Court disagrees.

Pursuant to the terms of the Act, courts are required to look to State law for the meaning and creation of implied warranty. *See* 15 U.S.C. § 2301(7). ("The term 'implied warranty' means an implied warranty arising under

State law. . . .") As this Court has ruled in the past, when determining whether an individual plaintiff may bring a cause of action under the Act for breach of implied warranty, that plaintiff first must look to the law of the State where he purchased his consumer product to see if that State requires the presence of vertical privity between himself and the manufacturer. *See Walsh v. Ford Motor Co.*, 588 F.Supp. at 1526. If the presence of vertical privity is necessary to create the existence of an implied warranty, plaintiffs from those States have no claim for an alleged breach of said warranty. *Id.* at 1525-26.

This examination of the varying State laws relating to the question of vertical privity does not serve as a barrier to class certification. In its opinion of March 14, 1984, the Court addressed the question of vertical privity in 13 contested States out of a total of 38 States listed in the second amended complaint where named plaintiffs purchased their vehicles. The Court is prepared, upon proper motion, to address the remaining jurisdictions not listed in the amended complaint on the issue of vertical privity.[11]

Ford also argues that there are numerous other State law variations which must be addressed in a class-wide claim for breach of implied warranty and that these variations prevent this Court from making a finding of predomination of common questions of law.

If the Court were to accept defendant's argument, no multi-State class action for breach of implied warranty under the Act could ever be possible. The denial of class certification because of potential State law variations would, in effect, repeal a congressionally-mandated Federal cause of action. Whatever State law variations may be present here, that alone cannot deny certification.

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[11] These States include Arkansas, Alaska, Hawaii, Kentucky, Louisiana, Montana, New Mexico, North Dakota, South Dakota, Rhode Island, Utah, and Wyoming.

The Court notes that although State law may create and define the existence of an implied warranty, the cause of action for the breach of said warranty is a *Federal* cause of action. *Compare* 15 U.S.C. § 2301(7) ("The term 'implied warranty' means an implied warranty arising under State law. . . .") *with* 15 U.S.C. § 2310(d)(1) ("a consumer who is damaged by the failure of a . . . warrantor . . . to comply with any obligation under this chapter, or under a written warranty [or] implied warranty . . . may bring suit for damages and other legal and equitable relief [in both State or Federal court]"). To conclude that a court must look to the many States, with their varying judicial interpretations of what constitutes breach of implied warranty, would make it virtually impossible to apply the Act in multi-State class actions for Magnuson-Moss breach of implied warranty claims. Surely, Congress could not have had intended such an unworkable result in a class action context.[12] Accordingly, the issue of varying State laws for breach of implied warranty for all owners as well as those in the "incidents" group cannot prevent the Court, at this time, from making a finding of predomination.

c. Damages for All-Owners Class

Defendant also argues that the question of individual damages cannot be resolved without individualized determinations as to each class.

Despite defendant's arguments, the issue of class-wide damages for the "all-owners" group can be easily resolved. Plaintiffs, for example, suggest that one method for determining damages of the proposed "all-owners difference-in-value" group is to examine the cost of a retrofit device which would eliminate the allegedly excessive "park-to-reverse incidents" risk and award that amount. Plaintiffs

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[12] The Court, however, is not prepared at this juncture to address the question of which law shall apply. At the appropriate time in this action this issue shall be addressed once the Court has had the benefit of the parties' briefing on this issue.

argue that this would eliminate any "difference in value" between the transmissions that they received and those that would be warrantable. Moreover, because the issue of property damage is not present in this group, the question of determining class-wide relief can be easily resolved. Accordingly, the issue of damages for the "all-owners" class will not bar a finding of predomination.

d. Viability of Asserting an All-Owners Difference-In-Value Group

Defendant's principal argument against the certification of an "all-owners" group is that the transmissions that have not had an alleged "park-to-reverse incident" have performed as warranted and therefore are merchantable. Ford argues that the reasoning set forth in *Feinstein v. Firestone Tire & Rubber Co.*, 535 F.Supp. 595 (S.D.N.Y.1982), compels this Court not to certify an all-owners class.The court in *Feinstein*, in refusing to certify a class of all owners of Firestone 500 steel-belted radial tires stated that:

> The case at bar does not turn on the adequacy of plaintiffs' pleadings, but rather upon actual performance of Firestone's tires, as revealed by the record developed between filing the complaint and moving for certification. The majority of the tires sold to putative class members, by doing what they were supposed to do for as long as they were supposed to do it, clearly lived up to that "minimum level of quality" which is all U.C.C. § 2-314(2)(c) requires. Thus no claim for breach of implied warranty is maintainable in respect of such tires. Plaintiff's bald assertion that a "common" defect *which never manifests itself ipso facto* caused economic loss" and breach of implied warranty is simply not the law.

Id. at 603 (emphasis in original).

Whatever the *Feinstein* court's reasons for making a strictly merits decision at the class certification stage of

the litigation, this Court does not feel bound, at this juncture, to make such a merits determination. As the Supreme Court in *Eisen* adopted: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 178, 94 S.Ct. at 2153 (quoting *Miller v. Mackey International, Inc.*, 452 F.2d 424, 427 (5th Cir.1971); *see also Blackie v. Barrack*, 524 F.2d at 901. Therefore, regardless of whether plaintiffs may be able to prevail on their claim of breach of implied warranty for all owners of vehicles with the relevant transmission is not for this Court to determine at this stage of litigation. Therefore, defendant's arguments are not controlling.

e. Individual Interests, Manageability, and Superiority Concerns

A vast majority of the "all-owners" plaintiffs seek relief only for "difference in value" or costs which would be associated with retrofiting the subject transmissions. These claims, it is undisputed, are relatively small and may amount to a total of under $50.00 for each Ford owner.

A class action for this group is, in effect, the only tangible way these plaintiffs could ever get relief for the claims they assert. Without the use of a class action, these plaintiffs would be without a remedy. A class action for relief is superior to receiving no relief at all.

As far as the manageability issues are concerned, both plaintiffs and defendant agree that a class of all owners for breach of warranty would be extremely large. Defendant argues that the size of this group would make management of the class action completely intractable.

The Court disagrees. Although this class will present its own group of difficult problems, the Court is of the belief that these difficulties can be managed effectively and ef-

ficiently with the aid of counsel. The question of individual issues does not cause difficulty here. Plaintiffs plan to present class-wide proof on the issue of merchantability. Defendant, in turn, will present its own class-wide evidence refuting plaintiffs' claims. The jury, it is presumed, will make a determination as to the merits of plaintiffs' claims. If they find that plaintiffs have prevailed, they will formulate a class-wide damage amount which each plaintiff, upon proper documentation, may claim.[13]

Finally, the issue of individual interests must be addressed. Ford argues that by proceeding as a class, some individual plaintiffs may potentially forego rights that they might otherwise receive if they had proceeded under their own State law remedies.

The Court notes that for a large majority of the potential plaintiffs a class action procedure would be the only possible way they might be able to attain relief. As Professors Wright and Miller note:

> [T]he court, must weigh the advantages of determining the common issues by means of a class action against the individual members' interest in separate adjudications of their rights. If the court determines that the former outweighs the latter, a class action under Rule 23(b)(3) should be proper.
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> * * * * * *
>
> [T]he interest the individual members might have in controlling the defense or prosecution of separate suits [may not be] important, if as a practical matter multiple actions would not be feasible because of the small amounts involved.

Wright & Miller § 1780 at 66 (footnotes omitted).

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[13] The issue of notice which could raise some manageability concerns is addressed *infra* at 409-412.

Whatever individual interests might exist for the "all-owners" plaintiffs, the reality that the class action procedure is the only viable means of pursuing these claims, certainly overrides these hypothetical individual concerns. As the court in *Veron J. Rockler & Co. v. Graphic Enterprises, Inc.*, 52 F.R.D. 335 (D.Minn.1971) stated so aptly:

> Defendants' attack upon the superiority of a class action would appear to rest upon the truism that the interests of individual plaintiffs are best protected through vigorous and capable prosecution of separate trials. If such were a proper basis for the determination of superiority, there would never be a class action.. . . [M]any of the claims of individual class members may be too small to justify on an individual basis, the investigative and litigation expense involved in prosecuting the suit. . . . Thus, absent active solicitation of claimants, with, perhaps, a promise to bear the cost of litigation, it is unlikely that all or most of those class members having small claims will ever come into court, regardless of the merits of their claims.

Id. at 346-47 (footnotes and citations omitted).

After examining all the arguments of the parties, the Court perceives no major impediment to conditionally certifying a group of "all-owners-difference-in-value" plaintiffs who assert claims for breach of implied warranty under the Act.

3. Incidents Group for Claims of Breach of Implied Warranty

Plaintiffs in the implied warranty class also propose a group of plaintiffs who sustained property damages due to an alleged "park-to-reverse incident." This group, like the "all-owners" group, pursue claims for breach of implied warranty under the provisions of the Act.

Defendant opposes certification of such a class because of the numerous individual issues involved in such a claim which cannot be resolved on a class-wide basis. As defendant notes, this group seeks recovery, not on the basis of a single auto accident or event, but rather on the basis of potentially tens of thousands of distinct automobile accidents.

Defendant argues that the Advisory Committee Note on Rule 23 states unequivocally that:

> A "means accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Fed.Civ.P. 23 Advisory Committee Note. Ford notes that courts have been reluctant to certify class actions involving claims on the basis of individualized experience with a mass-produced product. *See In re Northern District of California, Dalkon Shield IUD Products Liability Litigation*, 693 F.2d 847, 853 (9th Cir.1982), *cert. denied*, 459 U.S. 1171, 103 S.Ct. 817, 74 L.Ed.2d 1015 (1983); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 880 (D.S.D.1982); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 407 N.Y.S.2d 196, 198-201, *appeal dismissed*, 46 N.Y.2d 731, 413 N.Y.S.2d 374, 385 N.E.2d 1301 (1978).

a. Satisfying the Predomination Requirement

Although the Court is aware of the management difficulties that may occur from certifying this group, and also is aware that there is a potential for the presence of numerous individual issues, the economies realized in addressing the common class-wide issues of this case compel this Court to grant certification. *See* Note, *Developments*

in the Law—Class Actions, 89 Harv.L.Rev. at 1505 ("the chief purpose of the predomination inquiry is . . . to determine whether a class action will in fact realize any litigation economies").

It must be noted that despite the Advisory Committee Note on Rule 23(b)(3), subdivision (b)(3)

> seems particularly appropriate for some tort cases of this type. The central issue of liability, for example, may be a difficult one that occasionally will require expert testimony, perhaps concerning the physical condition of a vehicle or the state of a technological art in a particular field of transportation or manufacturing. If the various tort claims were tried individually, the evidence would have to be repeated time and time again.

Wright & Miller § 1783 at 116-117.[14] Moreover, courts aware of the Advisory Committee admonition have still certified class actions in products liability actions. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 723 (E.D.N.Y.1983), *petition for writ of mandamus denied*, 725 F.2d 858 (2d Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1417, 79 L.Ed.2d 743 (1984); *Payton v. Abbott Labs*, 83 F.R.D. at 391.

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[14] The court in *In re Gabel*, 350 F.Supp. 624 (C.D.Cal. 1972), noted that:

> notwithstanding some cases to the contrary and notwithstanding the suggestion in the notes of the advisory committee that class actions should not be used in Tort cases, the plain language of F.R.Civ.P. 23 was devised for just such a situation. . . . If that rule was not intended to cover Tort actions or death actions in crash cases, or *any kind of a Mass Tort*, it would have been simple enough to have said so in the text of the rule. But the rule is very broad in its language so as to permit the courts to eliminate repetitive and burdensome litigation. . . .

Id. at 627 (emphasis added).

In approaching the issue of certification for the incident group, the Court must also be mindful that although there is the formidable presence of potentially individual issues such as causation, affirmative defenses, and damages, the existence of these issues is not necessarily dispositive. The Court has the tools available either to certify a strictly limited group of issues, establish various subclasses, or address the common issues on a class-wide basis and manage the individual issues such as damages and individual affirmative defenses at the conclusion of the class-wide trial.

Judge Weinstein in *In Re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, was faced with the identical argument that defendant asserts here. He noted that:

> [d]efendants strongly contend . . . that the heat of any product liability claim, causation, can never be common to the class since each veteran, spouse, and offspring who has instituted a lawsuit claiming direct or derivative injuries from the veteran's exposure to Agent Orange brings to this case a unique history upon which his or her claim for damages is predicated. Each veteran was exposed, if at all, at different times, at different places and under different circumstances. Therefore, the argument continues, a determination on the issue of causation, whether made as a finding of general causation or as a result of a finding in "test" cases, can never be dispositive of the claims of the other class members and as a result common questions do not "predominate."

Id. at 721. Despite such formidable arguments the court in *"Agent Orange"* did certify a class of all persons who were harmed by exposure to the carcinogen, including spouses and family members who were directly or derivatively injured as a result of the exposure. *Id.* at 729. This Court, despite the presence of what appears to be for-

midable, but nevertheless arguable "individual" issues, also will certify an "incidents" class for breach of implied warranty. Although the Court is not prepared to decide, at this stage, exactly how it will resolve some of the non-common issues in this case, such as causation and affirmative defenses, it notes that plaintiffs' "presumption" argument may provide a means for resolving these issues.

b. Plaintiffs' Suggested Presumption Argument

Plaintiffs intend to rely on class-wide technical and statistical proof which would demonstrate the "extremely high" rate of Ford "park-to-reverse incidents," specific common defects in the transmissions, and direct proof of the unlikelihood of intervening causes to establish, a *prima facie* presumption that each incident was due to design and manufacturing error and not a hypothetical intervening cause. Thus, plaintiffs propose to utilize class-wide proof on the issue of merchantability in order to prove their claim of breach of implied warranty for owners who endured "park-to-reverse incidents."

Plaintiffs propose that upon presentation of class-wide proof, defendant will have the opportunity to counter with its own class-wide evidence. Ford could present its own expert testimony designed to demonstrate how intervening causes might have been responsible for "park-to-reverse incidents." At this stage, no individual issues would be examined. If plaintiffs do not prevail in establishing a presumption as to liability for breach of warranty, the case would be dismissed and there would be no need to delve into individual issues.

Plaintiffs further state that if they prevail on the class-wide issues and establish a *prima facie* "presumption" for breach of implied warranty, defendant would have the opportunity to challenge any individual class member on the ground that some intervening cause was responsible for the product failure. At this stage, individual issues of damages would be addressed as well.

Plaintiffs note that, when class-wide proof is offered to demonstrate that the subject transmission suffered from a higher failure rate as compared to othe types of transmissions, the number of "park-to-reverse incidents" that were the result of intervening causes should be no higher than the number of incidents for owners of other manufacturers' vehicles. Plaintiffs state that this is true unless Ford can demonstrate that its vehicles were sold not to ordinary motorists, but to a special group of motorists who, for example, drove their vehicles in some unusual manner which caused these transmissions to fail. They further state that the percentage of incidents involving intervening causes should be no higher than any other type or brand of transmission if there were no defect in the subject transmission.

One of defendant's principal claims of individual intervening causes is that of driver error. It argues that by failing to place the control lever properly in the park position, the individual driver causes the transmission lever to slip into the reverse position. Ford contends that examination of individual circumstances to determine if driver error was responsible for a "park-to-reverse" incident must take place for each plaintiff. Plaintiffs note, however, that claims of driver error cannot be considered an intervening cause. They assert that whether the alleged transmission design defect is such that a driver, conforming to ordinary standards of care, would at times likely fail to engage the car in the "true" park position is a central merits issue that must be decided at the class-wide stage of this litigation.

Plaintiffs also state that if they prevail on the class-wide *prima facie* presumption, any alleged intervening causes as asserted by Ford would be *de minimus* in number. They rely on the experiences of the named plaintiffs set forth in the detailed examination and analysis of the 163 vehicles listed in the second amended complaint. *See* Plaintiffs' Reply to Defendant's Opposition to Class Cert-

ification of the Count I Implied Warranty Claims, Exhibit A. This detailed analysis of the 163 vehicles demonstrates that the total number of prior accidents, prior transmission repairs, mechanical discrepancies, and other "intervening causes" were not significant. Although defendant disputes some of the conclusions of this examination, plaintiffs' point is well made. This analysis indicates that for a large majority of alleged "park-to-reverse incidents" an "intervening cause" may not be responsible. If plaintiffs are successful in establishing their presumption, the fact that a defendant may be able to defeat a showing of causation as to a few specific plaintiff class members will not transform the common issues into a multitude of individual questions. *See Blackie v. Barrack*, 524 F.2d at 907 n.22.

Ford argues that if the Court finds plaintiffs' "presumption" argument compelling, defendant will be entitled to have extensive discovery on each individual plaintiff who asserts claims for breach of implied warranty. Although a defendant has a right to disprove causation to an individual plaintiff, that defendant

> does not have unlimited rights to discovery against unnamed class members; the suit remains a representative one. *See Clark v. Universal Builders, Inc.* 501 F.2d 324 (7th Cir.1974); *Gardner v. Awards Marketing Corporation* 55 F.R.D. 460 (D.Utah 1972); *Fischer v. Wolfinbarger*, 55 F.R.D. 129 (W.D.Ky.1971). The district judge may reasonably control discovery to keep the suit within manageable bounds, and to prevent fruitless fishing expeditions with little promise of success. He may also exercise discretion in the conduct of the trial, to prevent a time-consuming series of mini-trials on causation, by limiting introduction of repetitive evidence or by limiting evidence to instances where causation is in doubt; he may also postpone trial of the rebuttal of individual causation until the damage stage of the trial; indeed, he has

> extensive powers to expedite the suit with procedural innovations. *See* Rule 23(d).

Blackie v. Barrack, 524 F.2d at 907 n.22. For the reasons stated in *Blackie*, the Court does not find that defendant would necessarily be entitled to unlimited discovery. Plaintiffs propose that then an individual plaintiff submits a notice of claim, that plaintiff could be required by Ford to answer questions such as the circumstances of the "incident" and the repair history of his vehicle. When these responses give Ford good cause, it could challenge any specific claim and take the necessary discovery to defend the individual claim. Discovery of any individual plaintiff could be limited to only when Ford has reason to believe that the claimed incident was caused by events other than transmission failure due to a design defect.

Plaintiffs cite as a proposition for this *prima facie* "presumption" method of proof, Title VII and securities fraud cases. *See, e.g., id.; Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Ford argues that plaintiffs' *prima facie* presumption theory is limited to Title VII or federal securities cases. It avers that this is true because either the express language and legislative history of the relevant statute, or certain "substantive principles" of the statute, permits courts to apply this presumption in these narrow circumstances.

The Court notes, however, that the use of a presumption also has been applied in fraud actions where individual proof of reliance was found to be unnecessary if it could be shown that the misrepresentation was material, *see Collins v. Rocha*, 7 Cal.3d 232, 237, 102 Cal.Rptr. 1, 3, 497 P.2d 225 (1972); *Vasquez v. Superior Court*, 4 Cal.3d 800, 815, 94 Cal.Rptr. 796, 804-05, 484 P.2d 964, 972-73 (1971); *Metowski v. Traid Corporation*, 28 Cal.App.3d 332, 338, 104 Cal.Rptr. 599, 601 (1972). Moreover, on appeal from a products liability action against a drug manufacturer, the United States Court of Appeals for the Fifth Circuit

did not require proof of proximate cause but instead permitted the use of a rebuttable presumption to establish liability. That court noted:

> Where a consumer, whose injury the manufacturer should have reasonably foreseen, is injured by a product sold without a required warning, a rebuttable presumption will arise that the consumer would have read any warning provided by the manufacturer, and acted so as to minimize the risks. In the absence of evidence rebutting the presumption, a jury finding that the defendant's product was the producing cause of the plaintiff's injury would be sufficient to hold him liable.

Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1281 (5th Cir.), *cert. denied,* 419 U.S. 1096, 95 S.Ct. 687, 42 L.Ed.2d 688 (1974); *Cunningham v. Charles Pfizer & Co.,* 532 P.2d 1377, 1382 (Okla. 1974). *See also Allen v. United States,* 588 F.Supp. 247, 415 (D.Utah 1984). Commentators have embraced the use of general modes of proof to help forward the use of class actions and resolve common claims and injuries. *See, e.g.,* Note, *Class Actions in A Product Liability Context: The Predomination Requirement and Cause-In-Fact,* Hofstra L.Rev. 859 (1978). Despite defendant's argument, the Court finds that the use of general modes of proof and the establishment of the rebuttable presumption can be applied in cases that reach beyond Title VII or federal securities regulation cases.

The use of a rebuttable presumption would be inconsistent with the remedial purposes of the Act. The Act is designed in part to ensure that consumers, who have been injured by a breach of warranty, have a means by which they can attain relief. In the House Report accompanying the warranty bill, the Committee on Interstate and Foreign Commerce explains:

> [I]f the [jurisdictional] conditions . . . are met by a class of consumers damaged by a failure to comply with a warranty . . . or violation of [the Act], section

> 110(d) [15 U.S.C. § 2310(d)] should be construed reasonably to authorize the maintenance of a class action. In this context, your Committee would emphasize that this section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers.

House Committee Report, *reprinted in* 1974 U.S.Code Cong. & Ad.News at 7724. Having to prove individually that the design defect was the cause in fact of a "park-to-reverse incident" would surely preclude the use of class action procedures for breach of implied warranty under the Magnuson-Moss Act.

It must be stressed again that the use of a class-wide *prima facie* presumption to establish breach of warranty will not prevent defendant from challenging any claim on the grounds of some intervening cause. In the damages portion of the case, Ford will have the opportunity to make such challenges.[15]

Accordingly, the Court finds that the use of plaintiffs' "presumption" theory may provide a reasonable means by which plaintiffs may prosecute their claims. It must be noted that each plaintiff is only asking that his transmission be judged for what it is, a mass-produced unit, which if compared to similar products, allegedly has a significantly higher failure rate. As the Court approaches the

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[15] In his concurrence in part and dissent in part in *McCarthy v. Kleindienst*, 741 F.2d 1406, 1420 (D.C.Cir. 1984), Judge Mikva notes of the "emptiness of th[e] distinction" between liability and damage phases of bifurcated trials. Recognizing that the noncommon damage issues may be addressed after the common issues have been dealt with on a class-wide basis, the Judge states that "I view the purported distinction [between liability and damages] as highly formalistic, for it makes the viability of a class depend on whether the very same issue is treated as a defense to the action or as a damage mitigation measure." *Id.* This Court views the individual defenses that may be asserted by Ford to be damage mitigation and therefore should be in the individual damages issue portion of the case, not the class-wide liability portion.

trial in this case, it shall, upon adequate briefing from the parties, address these issues more completely.

c. Questions of Manageability

As with any large class action that requires an examination of individual damages, the manageability problems are immense. Merely the presence of individual damages issues, however, cannot bar certification. As the court stated in *Samuel v. University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976):

> In almost every class action, factual determinations [of damages] . . . to individual class members must be made. . . . Still we know of no case where this has prevented a court from aiding the class to obtain its just restitution. Indeed, to decertify a class on the issue of damages or restitution may well be effectively to sound the death-knell of the class action device.

Id. at 995 (citations and footnote omitted). *See also McCarthy v. Kleindienst*, 741 F.2d at 1415.

Although the Court is aware of the substantial difficulties involved in managing individual damage issues in a bifurcated trial, these difficulties can be overcome. One author has reviewed numerous potential alternatives available to the Court.

> As a result of the remedial problems inherent in (b)(3) class damage actions, commentators have proposed numerous alternatives to provide relief in the event that the plaintiff class prevails on the liability issue. The courts may employ a broad range of available techniques, including summary judgment procedures, damage calculations on a class-wide basis, masters' determinations, and other administrative claims processing. Courts have frequently employed a proof of claim procedure to ease the damage proof problem. In this procedure each member of the class is instructed to complete within a specified time pe-

> riod a standardized questionnaire describing his injury. A number of courts have proposed to employ the concept of a fluid class recovery, whereby aggregate damages are calculated and distribution is achieved through a proof-of-claim procedure. One commenator suggests trying the damage issue only once, with a single award to the class, followed by an administrative mechanism to divide the lump sum recovery among the individual members.

Comment, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 Sw.L.J. 743, 756-57 (1982) (footnotes omitted); *see also, e.g.*, Williams, Spencer, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983). The Court at this stage is not prepared to state which method would be appropriate to resolve the individual issues presented in this case. It need not resolve this question until the class-wide issues have been tried. As the court explained in *Rosack v. Volvo of America Corp.*, 131 Cal.App.3d 741, 182 Cal.Rptr. 800 (1982), *cert. denied*, 460 U.S. 1012, 103 S.Ct. 1253, 75 L.Ed.2d 482 (1983):

> speculative problems with regard to computation of damages should not . . . [be] fatal to class certification. . . . Any one of a number of procedures [are] available which would . . . allow[] this action to proceed and which have postponed a specific determination at this early stage[,] of the precise formula for calculating individual damages.

Id. 182 Cal.Rptr. at 813.

Accordingly, for the reasons stated above, the Court can see no impediment to conditionally certifying a class for claim of breach of implied warranty arising under the Act.

PLAINTIFFS' WRITTEN WARRANTY CLASS

Plaintiffs seek to certify the following class for breach of written warranty under Magnuson-Moss.

Written Warranty Incidents, pursuant to Rule 23(b)(3):

> All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4 or C-6 automatic transmission seeking recovery of property damages incurred as a result of a Ford park-to-reverse incident occurring within the 12,000 mile/12 month written warranty period above which they complained to Ford or a Ford dealer within a reasonable time thereafter, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.

Plaintiffs' Proposed Class Certification Order, June 13, 1984. Within this implied warranty group plaintiffs also seek to certify a "difference-in-value" damages class under Rule 23(b)(3) or an equitable relief "recall/retrofit" class. *See id.*

Many issues that confront the written warranty class were addressed in the Court's analysis of plaintiffs' implied warranty class. For the reason, the Court shall address briefly only those issues which are unique to the written warranty claims. For the reasons stated above, *see supra* at 391-392, the Court will decline to certify the proposed (b)(2) group of All Owners Seeking Recall/Retrofit Equitable Relief. Plaintiffs' request for monetary relief under Rule 23(b)(3) would fully compensate them for their claims of breach of written warranty.

With regard to plaintiffs' Rule 23(b)(3) "all-owners" and "incidents" breach of written warranty claims, defendant asserts largely the same arguments against certification. Defendant argues that issues, such as presentment, refusal of service, notice, and damages, must be considered on an individual basis before any plaintiff may prevail in a class for breach of implied warranty. As noted *supra,* the Court

is prepared to address the common issues during the class-wide phase of the trial. The individual issues, if they prove to be truly in contention, shall be addressed at the individual or damages phase of the trial. Plaintiffs suggest that for a large number of plaintiffs, all that would be required at this phase would be evidence of property damages, that the incident occurred within the warranty period, and that within a reasonable time thereafter the claimant either complained to Ford or presented his vehicle to Ford or one of its dealers. Although the Court will not adopt plaintiffs' theory at this stage of the litigation, it notes that plaintiffs have, for class certification purposes, established a credible theory for proceeding on a class-wide basis for claims of breach of written warranty arising under Magnuson-Moss.

Additionally, any State law variations this Court may eventually be asked to address in the implied warranty claims arising under the Act do not present themselves in claims for breach of written warranty. The Act explicitly defines written warranty and establishes a cause of action for breach of said warranty. *See* 15 U.S.C. §§ 2301(6), 2302, 2303, 2304, 2310(d)(1). Although there are undeniably individual issues involved in the written warranty claims, particularly as to the question of damages and any mitigating factors as to the level of damages, the class-wide issues predominate over this class. Much economy will be enjoyed if plaintiffs are permitted at one judicial proceeding to try all of the written warranty issues. Accordingly, the Court will certify this class.

PLAINTIFFS' PERSONAL INJURY CLASS

Plaintiffs seek certification of the following class:

> CLASS V—*Personal Injury Incidents—Declaratory Judgment on Common Liability Issues,* pursuant to Rule 23(b)(3):

All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission, including family or household members entitled to enforce Ford's written or implied warranties pursuant to UCC § 2-318, who were seriously injured in person (i.e., who claim personal injury, property, and/or punitive damages exceeding $10,000) as a result of such Ford vehicle's park-to-reverse incident, certification of this class to be limited to the common liability issues to be litigated with respect to [the implied and written warranty classes], and including the following subclasses of such persons:

(a) all persons described in [written warranty class] without limitation as to whether the incident resulted in property damage, the date of the vehicle's purchase, or the date of the incident,

(b) all persons described in [implied warranty class] without limitation as to whether the incident resulted in property damage, the date of the vehicle's purchase, or the date of the incident, but including such Ford vehicles purchased in Connecticut, Ohio, Indiana, or Washington, and

(c) all persons injured by such incidents in the states of Alabama, Arizona, Illinois, New Jersey, New York, or Wisconsin, which persons assert strict product liability claims.

Plaintiffs' Proposed Class Certification Order, June 13, 1984.

In approaching the issue of certification for all those claiming personal injuries, the Court must be mindful of what it has already conditionally certified. Both the implied and written warranty class claims with their various potential subclasses, which arise by virtue of the Federal

Magnuson-Moss Act, provide this Court and the parties with a formidable challenge. Although this Court assumes that most of the difficulty associated with proceeding with these classes can be overcome, it will not be without significant effort. The Court believes that it must undertake this effort, particularly because of the expressed intent by Congress to afford consumers effective methods to pursue their claims for breach of warranty through the class-action vehicle. Plaintiffs' personal injury claims arise, however, not under the Federal Magnuson-Moss Warranty Act, but under diversity of citizenship. The Act specifically excludes from its coverage claims for personal injuries. *See* 15 U.S.C. § 2311(b)(2).[16] The Court is, therefore, required to look to State law to determine the substance of plaintiffs' personal injury claims.

Plaintiffs assert that this class should be certified because the common issues involved in a putative personal injury class are virtually identical to those of the property damage claims arising under the "incidents" breach of implied warranty class. Plaintiffs state that whether the consequences of an alleged "park-to-reverse incident" happen to be property damage or personal injury is strictly a matter of fortuity. They argue that there is no justification for treating two types of claims differently.

Although the Court finds plaintiffs' argument persuasive, it must conclude that certification of a class for those alleging personal injury claims cannot be certified without the Court facing intractable management problems. Unlike the Magnuson-Moss warranty claims, plaintiffs' claims for personal injuries arise under State law *exclusively*. Certifying a class of this type would compel the Court to examine "56" potential State law variations. Further, as even plaintiffs note, no single theory

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[16] Section 2311(b)(2) of Title 15, United States Code provides in pertinent part: "Nothing in this chapter . . . shall . . . affect the liability of, or impose liability on, any person for personal injury. . . ."

of recovery could encompass every plaintiff. Claims for personal injury arise under at least four separate theories, including breach of express warranty, breach of implied warranty, strict liability, and negligence. Although plaintiffs state that they will be able to meet each theory of recovery when establishing their personal injury claims, the Court is concerned about the number of potential variables that could face a jury in what plaintiffs describe as the common-issue, class-wide portion of the trial. The potential for confusion by the jury would be significant.

In addition, the management difficulties in coordinating these subclasses and processing the individual issues and damage claims would be immense. Unlike the property damage claims for breach of warranty arising under the Act, extensive discovery will be required as to each individual's claims concerning, for example, the extent of injuries incurred. No court-supervised claims process could possibly handle the multitude of individual issues that would arise from a personal injury class.

The Court is also concerned about the individual interests that are at stake in a personal injury class claim. Plaintiffs with personal injury claims, arising from a "park-to-reverse incident," may have significantly higher monetary claims and, therefore, would have a correspondingly greater interest in individually controlling the course of their litigation. As one commentator has observed, "Whenever individual class members claim high value, their interests in controlling the prosecution of those claims is increased and the propriety of a class action decreased." Note, *Mass Accident Class Actions*, 60 Calif.L.Rev. 1615, 1634 (1972). The presence of potentially significant individual interests cuts against a grant of certification of this class.

Because of what the Court perceives to be intractable management problems, as well as the compelling interests of individuals who claim personal injuries, the Court, in

its discretion, denies certification of the personal injury class.[17] It denies certification of this class in light of the classes that it has already certified and given the complexities and difficulties yet to be dealt with as to those certified classes.[18]

PLAINTIFFS' PUNITIVE DAMAGES CLASS

Finally, plaintiffs seek to certify the following class claim for punitive damages.

Punitive Damages Incidents:

> All members of [the implied and written warranty classes and the personal injury class] including the following subclasses of such persons:
>
> (a) pursuant to Rule 23(b)(3), all such persons claiming punitive damages directly under the Magnuson-Moss Act, and
>
> (b) pursuant to Rule 23(b)(1)(B), all such persons, except those whose injuries occurred or whose Ford vehicles were purchased in Washington, Louisiana, Massachusetts, Connecticut, and Michigan, claiming punitive damages under state law, with further subclasses defined as necessary according to

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[17] The Court observes in passing that this denial of certification does not necessarily foreclose for this putative class the opportunity to benefit from a favorable determination as to the other claims certified in this case. The "personal injury" group may possibly enjoy the offensive use of collateral estoppel through the potential *res judicata* effect of successful litigation on the implied and written warranty class claims. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

[18] Ford argues that the 28 named plaintiffs listed in the second amended complaint who are pursuing personal injury claims should be transferred, pursuant to 28 U.S.C. § 1404, to the jurisdiction where the accident occurred or where these plaintiffs reside. Plaintiffs oppose such a transfer. The Court, at this time, will withhold judgment on this issue until it has been fully addressed by the parties.

(i) whether the person asserts a warranty, strict products liability, or negligence claim, and

(ii) whether the applicable state standard for an award of punitive damages is gross negligence or willful misconduct.

Plaintiffs' Proposed Certification Order, June 13, 1983.[19]

Because the Court has declined to certify the personal injury incidents putative class, punitive damages claims must arise solely from the implied and written warranty claims under the Magnuson-Moss Act.

In reviewing the text of the Act and its legislative history, the Court observes that no mention of punitive damages is made by Congress. In an act which specifically discusses attorney's fees and the kinds of claims permitted and prohibited, this absence of language could lead a court to conclude that Congress did not intend to have punitive damages lie in Magnuson-Moss causes of action. The Act does, however, provide that "a consumer who is damaged by the failure of a . . . warrantor . . . to comply with any obligation . . . under a written warranty [or] implied warranty . . . may bring suit for damages *and other legal and equitable relief*. . . ." 15 U.S.C. § 2310(d)(1) (emphasis added). Magnuson-Moss also provides that "[n]othing in [the Act] shall invalidate or restrict any right or remedy of any consumer under State law. . . ." 15 U.S.C. § 2311(b)(1).

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[19] Plaintiffs exclude in their (b)(1)(B) subclass all persons who purchased their vehicles in the States of Washington, Louisiana, Massachusetts, Connecticut, and Michigan. They reason that "a few states—Washington, Massachusetts or Louisiana—do not permit punitive damage recoveries for common law torts and that Connecticut and Michigan permit only 'exemplary damages,' which are compensatory in nature." Plaintiffs' Reply to Defendant's Opposition to Plaintiffs' Supplemental Memorandum in Support of Class Certification of Counts II, III, IV, and V at 39. Accordingly, "those five states would simply not be included in the class." *Id.*

Plaintiffs argue that uniform Federal law governs the award of punitive damages under the Act. This uniform Federal law would be derived from a majority of all the States, as surveyed by the Court. Plaintiffs cite *Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983), as support for this proposition. In *Smith,* the Supreme Court found that punitive damages are available under section 1983, Title 42, United States Code (section 1 of the Civil Rights Act of 1871). The Court made this conclusion despite the lack of legislative history on the issue. Justice Brennan, writing for the Court, stated that "[i]n the absence of more specific guidance, we look first to the common law of torts . . . with such modification or adaption as might be necessary to carry out the purpose and policy of the statute." The Court went on to review State standards for claims of punitive damages in tort cases in order to develop a Federal standard for such damages. *See id.* at 48, 103 S.Ct. at 1636. It concluded after this review that "a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected right of others." *Id.* at 56, 103 S.Ct. at 1640.

Plaintiffs argue that this Court must apply the reasoning in *Smith* to the present case. They state that the Court must survey the majority position of the many different States on whether and in what circumstances punitive damages may be recovered in a warranty or contract action. If it is concluded, plaintiffs aver, that a majority of States permit recovery of punitive damages, then that should be the adopted Federal standard.

In the alternative, Ford argues that if punitive damages exist at all in Magnuson-Moss actions, the Court must apply the State law which is applicable to each plaintiff. Defendant notes that numerous Federal courts in addressing the punitive damages issue for claims arising under

the Act have concluded that, if punitive damages are available at all under Magnuson-Moss, the governing State law applies. *Boelens v. Redman Homes*, 748 F.2d 1058, 1069 (5th Cir. 1984); *Saval v. BL, Ltd.*, 710 F.2d 1027, 1033 (4th Cir. 1983); *Mackenzie v. Chrysler Corp.*, 607 F.2d 1162, 1166-67 (5th Cir. 1979); *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d at 1132 n. 44; *Schafer v. Chrysler Corp.*, 544 F.Supp. 182, 185 (N.D.Ind. 1982); *Lieb v. American Motors Corp.*, 538 F.Supp. 127, 132-33 (S.D.N.Y. 1982); *Novosel v. Northway Motor Car Corp.*, 460 F.Supp. 541, 545 (N.D.N.Y. 1978). The most cogent explanation for this conclusion was expressed by the court in *Lieb v. American Motors Corp.*, 538 F.Supp. 127. There the court noted:

> The availability of punitive damages under Magnuson-Moss has not been authoritatively determined. Legislative guidance, unfortunately, is entirely lacking. Congress was silent on the scope and measurement of damages under the Act. No court has awarded exemplary damages for Magnuson-Moss violations, and at least one court has refused to allow them. . . .
>
> * * * * * *
>
> In the absence of an explicit Congressional mandate, courts have sought guidance from applicable State breach of warranty laws.

Id. at 132-33 (citations omitted).

Ford further argues that if punitive damages are available under the Act, it would be impossible to incorporate all of the various State punitive damages laws into a single class. It argues that the variation in State law would prohibit any conclusion that common issues of law predominate in a punitive damage claim.

The Court disagrees. To determine which law governs the punitive damages issue, a court must examine the choice of law rules of the forum. In the District of Co-

lumbia, the courts employ "interest analysis" as its choice of law principle. *See, e.g., Hitchcock v. United States,* 665 F.2d 354, 360 (D.C.Cir. 1981). In addition, a court must examine the purpose of punitive damages. "Punitive damages are often referred to as 'exemplary damages.' " Seltzer, Richard A., *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control,* 50 Fordham L.Rev. 37, 42 n. 30 (1983). An award of punitive damages is not really damages at all. "Rather, they are quasi-criminal sanctions imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and the potential wrongdoers." *Id.* at 43 (footnote omitted).

As this Court found in *Keene corp. v. Insurance Company of North America,* 597 F.Supp. 934 (D.D.C. 1984):

> States' interests in compensatory damages differ from those involved in punitive damages. . . . When the primary purpose of a rule of law is to deter or punish conduct, the States with the most significant interests are those in which the conduct occurred and in which the principal place of business and place of incorporation of defendant are located. . . . The State of domicile of plaintiff has no interest in imposing punitive damages. "The legitimate interests of [plaintiffs' domiciliary] states, after all, are limited to assuring that the plaintiffs are adequately compensated for their injuries. . . . Once the plaintiffs are made whole by recovery of the full measure of compensatory damages to which they are entitled under the law of their domiciles, the interests of those States are satisfied." *In Re Air Crash Disaster Near Chicago, Illinois,* 644 F.2d [594] at 613 [(7th Cir. 1981)]. The place where the injury occurred and where the parties' relationship is centered do not claim as great an interest in the punitive damages issue as in other tort-related issues.

Id. at 938-39 (citations omitted). In *In Re "Agent Orange" Product Liability Litigation,* 580 F.Supp. 690 at 705 (1984), Judge Weinstein analyzes the choice of law for punitive damages purposes. He explains that:

> [T]he states of the veterans' domicile do not have an interest in whether or not punitive damages are imposed on the defendants. The legitimate interests of those states are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries. . . . The only jurisdictions concerned with punitive damages are those, including the federal government, with whom the defendants have contacts significant for choice of law purposes. Those contacts include defendants' place of incorporation, principal place of business, location of the plants that manufactured Agent Orange, and the site of any action taken in furtherance of what plaintiffs refer to as "the conspiracy of silence."

Id. at 705-06 (citations omitted).

The reasoning of these cases is directly applicable to the present case. Because the purpose of punitive damages is to punish alleged wrongdoings, the jurisdiction with the greatest contacts or the location where the alleged egregious activity took place may be the jurisdiction which this Court should look to in determining the standard for punitive damages. Defendant Ford is a Delaware corporation with its principal place of business located in or near Detroit, Michigan. Second Amended Complaint at ¶ 21. The Court presumes, subject to the parties' assertion otherwise, that the transmissions at issue were designed in Michigan. It further presumes that the willful misconduct and gross negligence alleged in the complaint also took place in Michigan. Accordingly, it is the Court's conclusion that Michigan has the greatest State interest in any imposition of punitive damages.

Although Michigan interests may be superior to those of any other State, the Court cannot ignore the national interests at issue in this case by virtue of the Federal Magnuson-Moss Warranty Act. Because the alleged wrongdoings are violations of Federal law and the parties are before this Court by virtue of the assertion of Federal claims, application of "interest analysis" may compel this Court to conclude that a uniform Federal law should be applied to punitive damages. *See supra* at 406-07.

The Court will decline, at this time, however, to certify a punitive damages class for claims arising under the Act until it has received sufficient briefing on the question of whether punitive damages are obtainable on claims under the Act and on the issue of which law applies, if punitive damages do, in fact, lie. Because the Court does not believe that failure to resolve the punitive damages certification issue at this time will result in any undue prejudice to the parties or that it will interfere with merits discovery, certification of a punitive damages class is denied at this time.

NOTICE

Before determining whether a court should grant class certification, it must examine the notice provision of Rule 23. Rule 23(c)(2) provides in pertinent part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed.R.Civ.P. 23(c)(2).

In addressing the notice question with respect to the "all-owners" class, plaintiffs state that they would be financially unable to provide individual notice to the potentially several million individual class members in the "all-owners difference-in-value damages" group as normally is required by Rule 23(c)(2) as construed by the Supreme

Court's opinion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732.

The Supreme Court has interpreted Rule 23(c)(2) to mean that "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. at 173, 94 S.Ct. at 2150. The Supreme Court in *Eisen* further stated that:

> [I]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. . . . Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.

Id. at 176, 94 S.Ct. at 2152 (footnote omitted).

Plaintiffs argue, however, that the legislative history and purposes of the Act overrule this strict notice requirement in Magnuson-Moss class actions.

I. The Issue of Individual Notice in Magnuson-Moss Class Actions

As noted *supra* at 386, absent a "direct expression by the Congress" to the contrary, provisions of the Federal Rules of Civil Procedure apply to all civil actions brought in district court. *Califano v. Yamasaki*, 442 U.S. at 700, 99 S.Ct. at 2557. An examination of the legislative history

is permissible to find this clear expression if the issue is not addressed within the terms of the statute. *See, e.g., Trbovich v. United Mine Workers of America,* 404 U.S. at 538, 92 S.Ct. at 636.

A few weeks after the Supreme Court issued its opinion in *Eisen* clarifying the requirements of notice in class actions, the House Interstate and Foreign Commerce Committee adopted the House Report to accompany the warranty legislation. *See* House Report, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7702. This report specifically addressed the notice issue that is presently before this Court. The Committee Report states:

> The purpose of these jurisdictional provisions is to avoid trivial or insignificant actions being brought as class actions in the federal courts. However, if the conditions of this section are met by a class of consumers damaged by a failure to comply with a warranty as defined in Title I or a violation of Title I, Section 110(d) should be construed reasonably to authorize the maintenance of a class action. In this context, your Committee would emphasize that this section is remedial in nature and is designed to facilitate relief which would otherwise not be available as a practical matter for individual consumers. *In particular, assuming that other requirements for a class action are met, your Committee does not believe that the requirement of individual notice to each potential class member should be invoked to preclude a class action where the identification and notification of the class members is not possible after reasonable effort by the plaintiff. In considering whether identification and notification of all members of the class is possible with reasonable effort, the particular circumstances of the plaintiff or plaintiffs should be carefully evaluated by the court, including the question of whether the financial burden of such identification and notification would be likely to deny them relief.*

Id. at 7724 (emphasis added). Although the Committee Report did not mention *Eisen* by name, it is plain that it interpreted the Act to afford every reasonable opportunity for a class of consumers to pursue generally small claims, without placing on these individuals the formidable and generally fatal burden of providing individual notice to every potential class member. The Senate-House Conference Committee adopted the House majority's position on class-action issues. *See* Senate Conference Rep. No. 93-1408, 93d Cong., 2d Sess. 27 (1974), *reprinted in* 1974 U.S.Code Cong. & Ad.News 7702, 7755, 7759 ("The conferees adopted the House [class action] provisions.")

During the floor debate prior to the Act's passage, Representative Charles A. Vanik stated that the clear intent of Congress, shown in the House Report adopted by the Conference Committee, was to overrule *Eisen* for the purposes of the Act:

> I appreciate the comments in the committee report relating to notification. The Supreme Court's arguments in the Eisen decision are based on congressional silence on the issue of notification. The direction provided by *the committee report makes it clear to the courts that it is our legislative intent to make the class action remedy a viable tool for consumers.*

120 Cong.Rec. 31738 (1974) (emphasis added). He went on to quote the relevant portions of the House Committee Report. *Id.* It should be noted that no member of Congress contradicted Representative Vanik's statement. Comments from other Representatives are worth citing as well. Congressman Herman Badillo in Extension of Remarks noted that:

> The bill, by explicitly providing that a consumer may file suit against a supplier who fails to comply with a warranty or service contract and by allowing class action suits *without the requirement of individual notification,* safeguards vital rights for consumers. Be-

> cause a majority of complaints involve goods of relatively low value, and individual legal costs are prohibitive purchasers cannot usually afford to press their rightful claims.

120 Cong.Rec. 32013 (1974) (extension of remarks) (emphasis added).

Ford correctly notes that comments by congressmen who are neither sponsors of the bill nor members of the committee who reviewed the legislation, are not entitled to significant weight. *See, e.g., Castaneda-Gonzalez v. Immigration and Naturalization Service,* 564 F.2d 417, 424 (D.C.Cir. 1977). It must be noted, however, that these clear expressions as to the intent of the statute are in fact supported by the House Committee Report, as well as by the statements of the Act's co-sponsor, Representative John E. Moss, *see* 120 Cong.Rec. 41406 (1974) ("The report authorizes class actions, provided [certain of the Act's] conditions are met and also where there are at least 100 named plaintiffs *notwithstanding any restrictions on such actions which might exist under general principles of Federal law.*" (emphasis added)).

It is worth noting that in the statement of "separate views," the minority members of the House Committee disagreed with the majority's interpretation of the Act's class-action provisions and read them applicable to the holding in *Eisen.* Separate Views on H.R. 7914, *reprinted in* 1974 U.S.Code Cong. & Ad.News 7747; *see also* 120 Cong.Rec. 41406 (Statement of Rep. Broyhill). Because it was the majority's interpretation of the class-action provisions of the Act which prevailed, these separate views only make clear that Congress was aware of the recent *Eisen* decision and determined that decision not applicable to Magnuson-Moss class actions.

Although no court has directly ruled on the notice question in Magnuson-Moss class actions, two courts in *dictum* have recognized Congress' expression of intent not to ap-

ply the strict notice provision of Rule 23(c)(2) to the Act. The United States Court of Appeals for the Seventh Circuit in *In re General Motors Corp. Engine Litigation*, 594 F.2d 1106, observed that: "The legislative history does indicate some dissatisfaction with the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 [94 S.Ct. 2140, 40 L.Ed.2d 732] . . . (1974), and perhaps indicates Congress' intention to make Rule 23(c)(2) inapplicable in some class actions maintained under the Magnuson-Moss Act." *Id.* at 1135 n. 50. In *Gorman v. Saf-T-Mate, Inc.*, 513 F.Supp. 1028 (N.D.Ind.1981), the court, in interpreting the remedial purposes of the Act, observed that:

> Congress obviously felt that most aggrieved consumers go without redress because their individual claims are too insignificant to command representation by counsel or to warrant all the other expenses of invoking the judicial process. "Because enforcement of the warranty through the courts is prohibitively expensive, there exists no currently available remedy for consumers to enforce warranty obligations." S.Rep. No. 93-151, 93d Cong., 1st Sess. 7 (1973). Congress was also of the view that existing federal and state court procedural requirements offered too many impediments to the maintenance of consumer class actions. *See* H.R.Rep. No. 93-1107, 93d Cong., 2d Sess., *reprinted in* [1974] U.S.Code Cong. & Ad.News 7702, 7724 (criticizing requirement of individual notice to potential class members). Accordingly, Congress sought to advance the federal policies expressed in the Warranty Act by fashioning a remedial mechanism for small consumer claims.

Id. at 1033.

Given the relevant legislative history, as well as the express purposes of the Act, the Court would plainly frustrate the intent of Congress to "facilitate relief which

would not otherwise be available as a practical matter for individual consumers," House Report, *reprinted in* 1974 U.S.Code Cong. & Ad.News at 7724, if it required individual notice to the "all-owners" group.

Ford, in opposing the interpretation of a less restrictive notice requirement under the Act, argues strenuously that if Congress had wished to relax the strict notice requirements as mandated by the Supreme Court's interpretation of Rule 23(c)(2) in *Eisen*, it would have specifically stated such notice variations in the statute itself. This argument highlights the very flaw of the Magnuson-Moss Act. The district court's observation in *Skelton v. General Motors Corp.*, 500 F.Supp. 1181 (N.D.Ill. 1980), *rev'd* 660 F.2d 311 (7th Cir. 1981), *cert. denied*, 456 U.S. 974, 102 S.Ct. 2238, 72 L.Ed.2d 848 (1982), aptly summarizes the deficiencies of the Act:

> A literal reading of the Magnuson-Moss Act is only a departure point for giving meaningful content to the statute which has been variously described as "disappointing", "opaque", and a product of "poor drafting". A review of the legislative history gives but limited solace. . . . Both proponents and opponents of an expansive interpretation have cited compelling, to them, legislative history only dimly related to the language which finally emerged as law.

Id. at 1184 (dictum) (footnotes omitted). There is no doubt that "[t]his Act needs some limited judicial first aid in order to be able to accomplish its remedial purposes." *Skelton v. General Motors Corp.*, 660 F.2d 311, 323 (7th Cir. 1981) (Wood, J., dissenting) (footnote omitted), *cert. denied*, 456 U.S. 974, 102 S.Ct. 2238, 72 L.Ed.2d 848 (1982). The Court has attempted to effect these purposes by providing a reasonable interpretation of the Act with respect to class certification issues and, more specifically, with respect to the requirement of notice.

II. Constitutional Due Process Considerations of Notice

Ford also argues that anything less than individual notice to each plaintiff in a class action would offend procedural due process.

The Court disagrees with Ford's position. First, it must be noted that the decision in *Eisen* is not based on constitutional due process requirements but simply on a strict interpretation of the language of Rule 23(c)(2) and its demand of individual notice for Rule 23(b)(3) actions. *See Eisen v. Carlisle & Jacquelin,* 417 U.S. at 173, 94 S.Ct. at 2150 ("[T]he import of [the] language [in rule 23(c)(2)] is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort."). Additionally, not all Rule 23 class actions require individual notice. For example, in subdivisions (b)(1) and (b)(2) class actions there exists no specific requirement to provide individual notice. *E.g., Robinson v. Union Carbide Corp.,* 544 F.2d 1258, 1260 (5th Cir.), *cert. denied,* 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977) (individual notice not required in subdivision (b)(2) class actions); *Larionoff v. United States,* 533 F.2d 1167, 1186 (D.C.Cir. 1976) (individual notice not required in subdivision (b)(1) class actions), *aff'd,* 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); *see also Sosna v. Iowa,* 419 U.S. 393, 397 n. 4, 95 S.Ct. 553, 556 n. 4, 42 L.Ed.2d 532 (1975) ("the problems associated with a Rule 23(b)(3) class action, which were considered by this Court . . . in *Eisen* . . . are not present in this case.").

Professors Wright and Miller suggest a reason why notice is required for Rule 23(b)(3) actions but not necessarily for Rule 23(b)(1) or (b)(2) actions:

> [T]he critical problem raising due process concerns in actions under subdivision (b)(3) is not simply notice of the institution of the action, but whether the absent members actually are adequately represented.

* * * * * *

> In representative actions brought under the other provisions of Rule 23(b), the class generally will be more cohesive. . . . Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.

Wright & Miller § 1786 at 143 (footnotes omitted).

The "all-owners" group in this case is in many ways similar to plaintiffs in a (b)(1) or (b)(2) class. First, the claims in the "all-owners" group are virtually identical to each other.[20] Each plaintiff in the "all-owners" group seeks a uniform damage amount, *i.e.*, "difference-in-value damages." Further, to prevail in this group and receive an award in damages, plaintiffs need only to provide class-wide proof and will be subject to only class-wide defenses. No individual issues or defenses will be present. Finally, as noted *supra*, these class-wide plaintiffs will be adequately represented both by competent counsel and by class representatives who seek a "difference-in-value" claim in addition to certain incidents claims or by class representatives who endured no "park-to-reverse incident" at all,

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[20] If there is any variation at all, it exists only in the type of transmission at issue or the type of warranty that was issued for a particular model year. The Court has noted that if these variations prove to be material, appropriate subclasses may be created. *See* Fed.R.Civ.P. 23(c)(4)(B).

but merely own a Ford vehicle with one of the subject transmissions.

It is important to note here that what is at issue in the "difference-in-value" group amounts to a relatively small claim for each plaintiff. The interests of individually controlling the litigation or of "opting out" of this class to pursue claims on one's own are not significant. A class action provides virtually the only reasonable means by which an individual can assert a "difference-in-value" claim.

Although no court has addressed this question of the due process necessity of individual notice in a Rule 23(b)(3), Magnuson-Moss class action, one commentator has addressed this issue:

> The procedural requirements in the Magnuson-Moss Act, together with those in rule 23, protect the rights of absent Magnuson-Moss Act class members even without an individual notice requirement. First, Magnuson-Moss Act plaintiffs must meet the same rule 23(a) prerequisites to class actions as must all class action plaintiffs. For Magnuson-Moss Act classes, this means that the class members probably will claim under the same warranty, thus ensuring some degree of homogeneity among the class members' claims and interests. Second, the Magnuson-Moss Act requires that would-be class representatives organize the claims of at least 100 named plaintiffs. Further, with so many named plaintiffs, courts can be confident adjudicated claims represent a fair cross-section of the claims of the class as a whole. Thus, as in subdivision (b)(1) and (b)(2) class actions, numerous safeguards protect unnotified Magnuson-Moss Act class members even in the absence of individual notice. In any event, if a court hearing a Magnuson-Moss Act claim believed that particular circumstances necessitated individual notice to protect the individual interest of potential class members, the court could order individual notice.

> The legislative history of the Magnuson-Moss Act evinces an intent to protect absent members by suspending the individual notice requirement only if such notice would be so onerous that it would effectively terminate the class action and deny plaintiffs relief. This scheme protects the interests of absent class members while permitting injured consumers to enforce their warranty rights free from the potentially prohibitive expense of notifying each identifiable class member individually.

Comment, *The Magnuson-Moss Act Class Action Provisions,* 70 Geo.L.J. at 1418 (footnotes omitted). The Court finds this reasoning compelling. It accordingly sees no procedural due process impediment resulting from plaintiffs' inability to provide individual notice.

For the "all-owners" group plaintiffs have suggested the following notice effort to be implemented:

> [N]otice to all class members who have complained about their park-to-reverse incidents to Ford, NHTSA, state attorneys general, or other government agencies, or private consumer groups. . . . [N]otice to fleet purchasers of cars equipped with these Ford transmissions. . . . [P]laintiff could notify insurance companies that pay claims for park-to-reverse incidents.

Plaintiffs' Motion for Class Certification, Appendix A: Plaintiffs Can Properly Notify the Proposed Class of its Certification at 12-13.

The Court will require plaintiffs to submit a detailed proposal as to how they expect to effect notice expanding on what has been proposed above. Further, the Court will require that plaintiffs effect "individual notice to all members who can be identified through reasonable effort[,]" Fed.R.Civ.P. 23(c)(2), and to all remaining classes and groups certified in this case.

CONCLUSION

Although this decision could not possibly address every conceivable issue presented by the parties in the over four hundred pages of briefing and at least 1,500 pages of exhibits that have been filed in support of and in opposition to the motion for class certification, it does focus on the major questions raised by the parties. It must be stressed that although the Court has granted certification of certain specific classes, these classes have been conditionally certified and may be decertified or amended if it becomes apparent that modifications to the class certification order are necessary. *See* Fed.R.Civ.P. 23(c)(1), (c)(4).

The Court also is interested in appointing a Special Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure, to assist the Court in supervising and facilitating discovery, to aid the Court in further narrowing the classes in this action, and to move this case expeditiously to trial. *See Manual for Complex Litigation* §§ 3.10, 3.21. The Court plans to address this issue at the next status conference with the parties.

For the reasons set forth above, the Court conditionally certifies the following classes to pursue claims against Ford for alleged breach of written and implied warranty:

I. Implied Warranty Incidents, pursuant to Rule 23(b)(3):

All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of property damages incurred as a result of a Ford park-to-reverse incident, but excluding such persons who purchased such Ford vehicles

(a) in States which require the presence of vertical privity to pursue such claims, or

(b) prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.

II. Written Warranty Incidents, pursuant to Rule 23(b)(3):

All purchasers or owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of property damages incurred as a result of a Ford park-to-reverse incident occurring within the 12,000 mile/12 month written warranty period about which they complained to Ford or a Ford dealer within a reasonable time thereafter, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.

III. All Owners Difference in Value Damages, pursuant to Rule 23(b)(3):

All owners (other than for purposes of resale) of 1976-1979 and 1980 pre-design change model year Ford vehicles equipped with an FMX, C-3, C-4, or C-6 automatic transmission seeking recovery of damages equal to the difference in value between those transmissions as warranted, but excluding such persons who purchased such Ford vehicles prior to August 21, 1977 and did not experience a park-to-reverse incident prior to November 2, 1977.